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APPENDIX

Supreme Court of the United States

October Term, 1969

No. 85

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,

Petitioners,

vs.

WILLIAM B. CAMP, Comptroller of the Currency of the United States, and AMERICAN NATIONAL BANK AND TRUST COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

Petition for Certiorari filed April 10, 1969.
Certiorari granted June 23, 1969.

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DOCKET ENTRIES

Date	Proceedings
6-15-67	Filed Complaint. Issued Summons.
7- 5	Filed Summons returned served June 16, 20 and 22 - 1967.
8-15	Filed Answer, with certificate of service by mail on 8-14-67. (Deft. Camp only.)
8-17	Filed Answer of defendant American National Bank and Trust Company, with aff. of service by mail on 8-16-67.
9-25	Filed motion of defendant American National Bank and Trust Company for dismissal of this action, with aff. of service by mail on 9-22-67. Not noticed for hearing at any given time.
9-26	Filed notice of motion returnable 10-10-67 at St. Paul, on motion of the defendant, William B. Camp, etc., for dismissal of this action; memorandum in support thereof, and cert. of service by mail on 9-25-67, are attached.
10- 4	Filed notice of motion returnable at St. Paul, Oct. 10, 1967, on motion of The American Bankers Association for leave to appear and file a brief amicus curiae. Three affidavits of service, personal, on 9-29-67, are attached.
10- 6	Filed reporter's transcript of prooceedings had 9-25-67. (Sutfin, reporter)
10- 9	Filed plaintiffs' memorandum in opposition to defendants' motion to dismiss.
10-10	Filed appearance of Matthew Hale, General Counsel for The American Bankers Association, 815 Conn. Ave. N.W., Washington, D.C.

Entered record of hearing on the following motions:

(a) Mo. by American Bankers Assn. for leave to appear and file brief in amicus curiae —granted without opposition to any of the parties.

(b) Mo. by Wm. B. Camp, etc., for dismissal —argued, taken under advisement.

(c) Mo. by American Nat. Bk. & Trust Co. for dismissal—argued, taken under advisement.

Mr. Kelley to submit reply to plaintiff's brief in two weeks.

Entered order admitting C. Westbrook Murphy to practice for the purpose of this trial, on motion of Stanley H. Green, Asst. U. S. Attorney.

Entered order admitting Matthew Hale to practice for the purpose of this action, on motion of Mr. Fallon Kelly.

10-19 Filed Reporter's Transcript of Proceedings of 10-10-67. (Sutfin, reporter)

1- 9-68 Filed and entered Order granting defendants' motions for dismissal of plaintiffs' Complaint and for entry of judgment. Memorandum attached thereto. (Neville - J.)

Filed and entered judgment of dismissal.

Mailed notice to counsel.

1-16 Filed reporter's certified notes of motion heard 10-10-67. (Sutfin - Rptr.)

1-17-68 Filed plaintiffs' notice of appeal from the order of dismissal entered herein Jan. 9, 1968.

Filed Bond on Appeal.

Mailed copy of notice of appeal to Patrick J. Foley, U. S. Attorney, 596 U. S. Courthouse, 110

S. 4th St., Minneapolis, Minn., to Carl Eardley, Acting Asst. Attorney General, Department of Justice, Washington, D. C., to Richard S. Beatty, Associate Chief Counsel, Office of the Comptroller of the Currency, Washington, D. C., to Kelly, Segell and Fallon, 500 Minnesota Bldg., St. Paul, Minn., and to Matthew Hale, The American Bankers Association, 815 Connecticut Ave. N. W., Washington, D. C.

1-25 Filed Appellants' Designation of Record on Appeal with aff. of service by mail 1-24-68.

16 Mailed c/copy of docket entries and Notice of Appeal to Robert C. Tucker, Clerk, U. S. Court of Appeals, St. Louis, Mo. 63101 (air mail).

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-67-165

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,

Plaintiffs,

vs.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, and AMERICAN NATIONAL BANK AND TRUST COMPANY,

Defendants.

COMPLAINT

1. Plaintiff Association of Data Processing Service Organizations, Inc. (hereinafter referred to as "ADAPSO"), is an incorporated association of data processing service organizations whose members are engaged in the business of performing data processing services for the business community throughout the United States. ADAPSO is incorporated under the laws of the State of Pennsylvania and has its principal place of business in Abington, Pennsylvania.

2. Plaintiff Data Systems, Inc. (hereinafter referred to as "DATA SYSTEMS"), is a business corporation duly incorporated under and doing business pursuant to the laws of the State of Minnesota, is a member of ADAPSO, has its principal place of business in Minneapolis, Minnesota, and is engaged in the business of marketing and performing data processing services for the general business community.

3. Defendant William B. Camp (hereinafter referred to as the "COMPTROLLER"), is the Comptroller of the Currency of the United States, and is a duly constituted officer of the Executive Branch of the Government of the United States, maintaining his official residence in the District of Columbia. His office is an "agency" of said Government within the meaning of Title 5 of the United States Code.

4. Defendant American National Bank and Trust Company (hereinafter referred to as "AMERICAN BANK"), is a national banking association organized and established pursuant to the National Banking Act (Chapter 2, Title 12, United States Code), and has its principal place of business at St. Paul, Minnesota.

5. This action arises under the National Banking Act (United States Code, Title 12, Chapter 2) and involves an interpretation and application of said Act, and a determination of the powers granted national banking associations under that Act as set forth in 12 U.S. Code §24.

6. This action is a proceeding for declaratory judgment and for an injunction pursuant to 28 U.S. Code Sections 2201 and 2202, and for damages. This court has jurisdiction of the controversy which is the subject matter of this action pursuant to 28 U.S. Code Sections 1331(a) and 1391(3) and 12 U.S. Code Section 94. The amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs. Action against the COMPTROLLER is also brought under Section 10 of the Administrative Procedure Act, 5 U.S. Code Section 701 ff. (1966) (formerly 5 U.S. Code Section 1009), the Declaratory Judgments Act, 28 U.S. Code Sections 2201 and 2202, and Sections 1331 and 1361 of the Judicial Code, Title 28 U.S. Code, to set aside the COMPTROLLER'S action in approving the marketing of data processing services by national banks as arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, and to enjoin the

COMPTROLLER from issuing any purported ruling permitting such activities by AMERICAN BANK or any other national banking association.

7. The defendant COMPTROLLER has by ruling and other administrative action authorized defendant AMERICAN BANK and other national banks to perform the data processing services hereinafter described.

8. The defendants COMPTROLLER and AMERICAN BANK may exercise only those powers granted to them, respectively, by the National Banking Act and defendant COMPTROLLER cannot, pursuant to his administrative authority, lawfully issue rulings authorizing a national bank to act beyond its statutory powers.

9. Pursuant to 12 U.S. Code Section 24, a national bank has only such incidental powers as shall be necessary to carry on the business of banking. Although the use and ownership of data processing equipment by a national bank may be incidental to the carrying on of its banking business in furtherance of the express powers granted by Congress with respect thereto, the making of such equipment available to others or the performance of data processing services for its customers, is non-banking business, not within the statutory grant of powers, and unlawful.

10. The defendant COMPTROLLER'S authorization to national banks permitting them to engage in the marketing of data processing services is therefore in violation of the National Banking Act, beyond statutory authority, arbitrary, capricious, an abuse of discretion and not in accordance with law.

11. As a result of defendant COMPTROLLER'S action, the marketing of data processing services by national banks has been growing rapidly, and is anticipated to grow even more rapidly in the future. Because of the enormous financial power of national banks and their banking relationships

with existing and potential customers for such services, the marketing of such services by national banks threatens ultimately to exclude all ADAPSO members and other independent service organizations from all or a very substantial part of the market for the sale of data processing services.

12. Defendant AMERICAN BANK, since on or before February 20, 1967, has been and is presently offering to perform and is engaged in the business of performing data processing services for the general business community.

13. On or about February 20, 1967, the defendant AMERICAN BANK entered into an agreement with the State Capitol Credit Union of St. Paul, Minnesota, whereby AMERICAN BANK agreed to perform certain data processing services required by said Credit Union, and since that time AMERICAN BANK has performed or has prepared to perform such services for said Credit Union.

14. Prior to February 20, 1967, plaintiff DATA SYSTEMS had entered into negotiations with the aforesaid Credit Union to provide data processing services for said Credit Union. On or about December 19, 1966, DATA SYSTEMS agreed with said Credit Union to perform certain data processing services. Because of the actions of AMERICAN BANK as above set forth, DATA SYSTEMS has been deprived of the right and opportunity to perform said services and to be compensated therefor.

15. On or about April 15, 1967, AMERICAN BANK entered into an agreement with Carlen Industries, Inc., of Minneapolis, Minnesota, whereby AMERICAN BANK agreed to perform certain data processing services required by said company and since that time AMERICAN BANK has performed or has prepared to perform such services for said company.

16. Prior to April 15, 1967, DATA SYSTEMS had entered into negotiations with Carlen Industries, Inc., to pro-

vide data processing services for said company. Because of the actions of defendant AMERICAN BANK, as hereinbefore set forth, DATA SYSTEMS has been deprived of the right and opportunity to perform said services and to be compensated therefor.

17. The foregoing activities of defendant AMERICAN BANK in performing, and in holding itself out as willing to perform, data processing services for the above-mentioned companies and for the general business community are illegal, not part of or incidental to the business of banking and beyond the powers granted to national banks under the National Banking Act.

18. By performing said illegal data processing services, and by holding itself out as willing and able to perform such services, AMERICAN BANK has caused and unless enjoined will continue to cause substantial and irreparable harm to DATA SYSTEM'S business and to the business of other members of ADAPSO, by depriving them of customers for whom data processing services would be rendered and from whom compensation would be received.

19. Plaintiffs have suffered serious injury and damage and are continuing to suffer such injury and damage by the unlawful authorization of defendant COMPTROLLER and by the illegal activities of defendant AMERICAN BANK as aforesaid.

WHEREFORE, plaintiffs demand judgment as follows:

(a) Declaring that defendant COMPTROLLER'S ruling and other administrative action authorizing national banks to perform or make available data processing services for their customers is arbitrary, capricious, an abuse of discretion, in excess of statutory authority and illegal;

(b) Enjoining defendant COMPTROLLER from promulgating any rule or policy that national banks have the power to engage in the marketing or performance of data

processing service business for their customers or for the general business community;

(c) Enjoining defendant AMERICAN BANK from performing, or holding itself out as willing and able to perform, data processing services for its customers or for the general business community;

(d) Awarding to plaintiff DATA SYSTEMS and against defendant AMERICAN BANK, damages in the amount of not less than $100,000.00; and

(e) For such other relief as the Court may deem just and proper.

SHANEDLING, PHILLIPS, GROSS & AARON
By /s/ BERT M. GROSS and FELIX M. PHILLIPS
Attorneys for Plaintiffs
909 Farmers & Mechanics Bank Building
Minneapolis, Minnesota 55402

(Filed in the United States District Court, District of Minnesota, Third Division, on 6-15-67.)

ANSWER OF DEFENDANT AMERICAN NATIONAL BANK AND TRUST COMPANY

Defendant, American National Bank and Trust Company, for its answer to the complaint of the plaintiffs herein:

FIRST DEFENSE

I.

Admits all the allegations contained in Paragraphs 3, 4, 13 and 15 of the Complaint.

II.

Alleges that it does not have sufficient information to form a belief as to the truth of the allegations contained in Para-

graphs 1 and 2 of the Complaint and puts the plaintiffs to the strict proof thereof.

III.

Alleges that it does not have sufficient information to form a belief as to the truth of the allegations contained in Paragraphs 14 and 16 of the Complaint and therefore denies the same and puts the plaintiffs to the strict proof thereof.

IV.

Alleges that the allegations contained in Paragraph 7 of the Complaint are so indefinite, uncertain, and incomplete that it does not have sufficient information to form a belief as to the truth of said allegations and therefore denies the same and puts the plaintiffs to the strict proof thereof; further answering, this defendant specifically alleges that defendant Comptroller has from time to time issued rulings and promulgated administrative action relating to the authority of national banks, including this defendant, to conduct their business, and that all of the actions of defendant American National Bank and Trust Company have been and are compatible therewith.

V.

Admits that a national bank cannot act in a manner other than as authorized by federal law as alleged in substance in Paragraph 8 of the Complaint, but denies all other allegations contained in Paragraph 8 of the Complaint.

VI.

This defendant states that the allegations contained in Paragraph 9 of the Complaint are conclusions of law not requiring answer; however, to the extent that answers may be deemed to be required, defendant denies the allegations contained therein.

VII.

Except as hereinbefore admitted, qualified, or otherwise alleged, this defendant denies each and every allegation, matter

and thing in said Complaint contained and more specifically as contained in Paragraphs 5, 6, 10, 11, 12, 17, 18 and 19.

SECOND DEFENSE

Plaintiffs lack standing to bring this action.

THIRD DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

WHEREFORE, defendant, American National Bank and Trust Company, prays that the plaintiffs' Complaint be dismissed, that it have its costs and disbursements herein, and that the Court grant such other and further relief as to it may seem just and proper.

/s/ FALLON KELLEY
/s/ HYAM SEGELL
Attorneys for Defendant American
National Bank and Trust Company
500 Minnesota Building
St. Paul, Minnesota 55101

Of Counsel:
KELLEY, SEGELL AND FALLON

(Filed in the United States District Court, District of Minnesota, Third Division, on 8-17-67.)

ANSWER

Defendant William B. Camp, Comptroller of the Currency of the United States, by his undersigned attorneys, in answer to the complaint herein, admits, denies and alleges as follows:

1. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the complaint.

2. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of the complaint.

3. Defendant admits the allegations contained in Paragraph 3 of the complaint.

4. Defendant admits the allegations contained in Paragraph 4 of the complaint.

5. Defendant denies the allegations contained in Paragraph 5 of the complaint.

6. Defendant denies the allegations contained in Paragraph 6 of the complaint except that he admits that this is a proceeding for declaratory judgment, injunction and damages.

7. Defendant states that the allegations contained in Paragraph 7 of the complaint are too vague and imprecise to be answered and that he is therefore without knowledge or information sufficient to form a belief as to the truth thereof.

8. Defendant states that the allegations contained in Paragraph 8 of the complaint are conclusions of law not requiring answer; however, to the extent that answers may be deemed to be required defendant denies the allegations contained therein except that he admits that a national bank cannot act in a manner other than as authorized by federal law.

9. Defendant states that the allegations contained in Paragraph 9 of the complaint are conclusions of law not requiring answer; however, to the extent that answers may be deemed to be required defendant denies the allegations contained therein.

10. Defendant denies the allegations contained in Paragraph 10 of the complaint.

11. Defendant denies the allegations contained in Paragraph 11 of the complaint.

12. Defendant denies the allegations contained in Paragraph 12 of the complaint.

13. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 13 of the complaint.

14. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 14 of the complaint.

15. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 15 of the complaint.

16. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16 of the complaint.

17. Defendant denies the allegations contained in Paragraph 17 of the complaint.

18. Defendant denies the allegations contained in Paragraph 18 of the complaint.

19. Defendant denies the allegations contained in Paragraph 19 of the complaint.

Defendant denies each and every allegation of the complaint not herein above admitted, qualified or denied.

SECOND DEFENSE

Plaintiffs lack standing to bring this action.

THIRD DEFENSE

The complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

WHEREFORE, Defendant, the Comptroller of the Currency of the United States, having fully answered prays that the complaint be dismissed with costs and that the Court grant such other relief as to it may seem just and proper.

Respectfully submitted,

/s/ CARL EARDLEY
Acting Assistant Attorney General
By /s/ STANLEY H. GREEN
Assistant United States Attorney

PATRICK J. FOLEY
United States Attorney
/s/ HARLAND F. LEATHERS
/s/ C. WESTBROOK MURPHY
Attorneys
Department of Justice Attorneys for
Defendant William B. Camp
Comptroller of the Currency

Of Counsel:
/s/ RICHARD S. BEATTY
Associate Chief Counsel
/s/ RICHARD DOERSCH
Attorney
Office of the Comptroller of the Currency

(Filed in the United States District Court, District of Minnesota, Third Division, on 8-15-67.)

MOTION OF THE DEFENDANT, WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, TO DISMISS THE ACTION

Defendant, William B. Camp, Comptroller of the Currency of the United States, by his undersigned attorneys moves the Court to dismiss this action upon the grounds that plaintiffs lack standing to maintain this action and that the Court lacks jurisdiction over the subject matter. In support of this motion the Court is respectfully referred to plaintiffs' complaint, and to the memorandum in support of this motion which is filed herewith.

Respectfully submitted,

CARL EARDLEY
Acting Assistant Attorney General
PATRICK J. FOLEY
United States Attorney
By: /s/ PATRICK J. FOLEY
Assistant United States Attorney
HARLAND F. LEATHERS
/s/ C. WESTBROOK MURPHY
Attorneys,
Department of Justice, Attorneys for
Defendant William B. Camp,
Comptroller of the Currency

Of Counsel:

/s/ RICHARD S. BEATTY
Associate Chief Counsel
/s/ RICHARD DOERSCH
Attorney
Office of the Comptroller of the Currency

NOTICE OF MOTION

To: Shanedling, Phillips, Gross & Aaron, 909 Farmers & Mechanics Bldg., Minneapolis, Minnesota 55402.

PLEASE TAKE NOTICE that William B. Camp, Comptroller of the Currency of the United States, and American National Bank and Trust Company, defendants above named, will bring the above motion on for hearing before this Court at the Federal Courthouse, St. Paul, Minnesota, on October 10, 1967, at 10:00 A.M. of that day, or as soon thereafter as counsel can be heard.

/s/ PATRICK J. FOLEY
United States Attorney
Attorney for Defendant
William B. Camp, Comptroller of the
Currency of the United States
596 U. S. Courthouse
Minneapolis, Minnesota 55401

(Filed in the United States District Court, District of Minnesota, Third Division, on 9-26-67.)

MOTION TO DISMISS

Defendant, American National Bank and Trust Company, by its attorneys, moves the Court to dismiss this action upon the grounds that the plaintiffs lack standing to maintain said action, and that the Court lacks jurisdiction over the subject matter. Said motion will be based upon all the files, records and proceedings herein and upon arguments to be adduced at a hearing thereon.

Dated: September 22, 1967.

FALLON KELLY
HYAM SEGELL
Attorneys for Defendant American
National Bank and Trust Company
500 Minnesota Building
St. Paul, Minnesota 55101

Of Counsel:
KELLY, SEGELL AND FALLON

(Filed in the United States District Court, District of Minnesota, Third Division, on 9-25-67.)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,

Plaintiffs,

vs.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, and AMERICAN NATIONAL BANK AND TRUST COMPANY,

Defendants.

ORDER

The above-entitled matter came duly on for hearing before the undersigned, a judge of this court, at St. Paul, Minnesota on the 10th day of October, 1967 on the motions of both defendants for a dismissal of plaintiffs' complaint on the grounds of lack of standing in plaintiffs to maintain the present action. Patrick J. Foley, United States Attorney, by Stanley H. Green, Esq. and C. Westbrook Murphy, Esq. of the Department of Justice, Washington, D. C., appeared for defendant Comptroller William B. Camp; Kelly, Segell and Fallon by Fallon Kelly and Hyam Segell, Esqs. appeared for defendant American National Bank & Trust Company; and Matthew Hale, Esq., appeared amicus curiae for the American Bankers Association; all in support of said motions. Shanedling, Phillips, Gross & Aaron by Bert M. Gross and Felix M. Phillips, Esqs., appeared for plaintiffs in opposition thereto.

The court has examined the pleadings, heard the arguments of counsel and examined and read the various briefs

submitted, and on the basis thereof and on all the files, records and proceedings herein,

IT IS ORDERED that defendants' motions for dismissal of plaintiffs' complaint be, and the same hereby are granted and plaintiffs' complaint is hereby dismissed.

Let judgment be entered accordingly.

Dated: January 8, 1968.

/s/ PHILIP NEVILLE
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,
Plaintiffs,

vs.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, and AMERICAN NATIONAL BANK AND TRUST COMPANY,
Defendants.

[OPINION]

Shanedling, Phillips, Gross & Aaron by Bert M. Gross and Felix M. Phillips, Esqs., appeared for plaintiffs.

Patrick J. Foley, United States Attorney, by Stanley H. Green, Esq., and C. Westbrook Murphy, Esq., of the Department of Justice, Washington, D. C., appeared for defendant Comptroller William B. Camp.

Kelly, Segell and Fallon by Fallon Kelly and Hyam Segell, Esqs., appeared for defendant American National Bank & Trust Company.

Matthew Hale, Esq., Washington, D. C., petitioned for leave to appear and file a brief amicus curiae on behalf of and as general counsel for The American Bankers Association, which petition the court granted.

NEVILLE, District Judge.

This matter comes before the court on motions by both defendants for an order of dismissal, grounded upon the alleged lack of standing in the plaintiffs to maintain the present action. Plaintiffs' complaint seeks a declaratory judgment, an injunction and compensatory damages, all on the theory that the marketing of data processing[1] to the public by defendant American National Bank is illegal and contrary to law. The complaint further avers that certain actions of the defendant Comptroller in approving the marketing of data processing services by national banks is "arbitrary, capricious, an abuse of discretion, in excess of statutory authority and illegal." The plaintiffs in essence seek a determination that the performing for a fee of data processing services by national banks for the public generally, or what were referred to on oral argument as "outsiders," is not within the scope of the powers and authority granted national banks under the National Bank Act as set forth in 12 U.S.C. §24. The pertinent provisions of this statute read as follows:

"§24. Corporate powers of associations.

Upon duly making and filing articles of association and an organization certificate a national banking asso-

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[1]As brought out in the oral arguments, data processing utilizes electronic devices, including what are commonly known as computers, to compile and calculate statistical information and is employed by businesses in the computation and preparation of payrolls, tax returns, monthly statements, bills and in other ways.

ciation shall become, as from the date of the execution of its organizaton certficate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

. . .

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, *all such incidental powers as shall be necessary to carry on the business of banking; . . .*" (Emphasis added.)

The allegation in the complaint as to the defendant Comptroller's administrative ruling is in general terms as follows:

"7. The defendant COMPTROLLER has by ruling and other administrative action authorized defendant AMERICAN BANK and other national banks to perform the data processing services hereinafter described." [2]

The plaintiff Association of Data Processing Service Organizations, Inc. ("ADAPSO"), is an incorporated association of data processing service organizations located throughout the United States whose members are engaged in the business of providing such type of service to the business community. Plaintiff Data Systems, Inc. is a Minnesota corporation with offices in Minneapolis, Minnesota, engaged in the business of marketing and performing data processing service for the general business community, and is a member of ADAPSO.

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[2]It appears from the brief submitted by the Comptroller that his position with respect to the furnishing of electronic data processing services by national banks was published as an interpretive ruling in the March 1964 supplement to the *Comptroller's Manual for National Banks*, paragraph 3500 of which reads as follows:

"A national bank may make available for the use of others processing equipment acquired for the primary purpose of performing service incidental to banking."

A later modification of this same paragraph, adhered to by the present Comptroller, appears in the *Comptroller's Manual* (October 15, 1966 ed.) in the following language:

"Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers."

The alleged injury to these plaintiffs resulting from the actions of the defendants is claimed to be solely an economic injury arising from what is contended to be illegal compe i-tion.[3]

The plaintiffs assert that they have standing to challenge the action of the Comptroller by virtue of Section 10 of the Administrative Procedure Act, 5 U.S.C. §701, et seq. The pertinent section of this Act, §702, provides that:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . ."

Since there are no specific provisions in the National Bank Act providing for a review of the Comptroller's rulings or conferring standing to maintain such actions as the instant case, it would appear that if the plaintiffs are to have what is called statutory standing at all, such must be grounded upon the above-quoted portion of the Administrative Procedure Act. The Eighth Circuit Court of Appeals, however, has adhered strongly to the view that the Administrative Procedure Act did not by its passage create any legal rights which did not otherwise exist and has cited numerous author-

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[3]Paragraph 11 of the complaint of plaintiffs charges:

> "As a result of defendant Comptroller's action, the marketing of data processing services by national banks has been growing rapidly, and is anticipated to grow even more rapidly in the future. Because of the enormous financial power of national banks and their banking relationships with existing and potential customers for such services, the marketing of such services by national banks threatens ultimately to exclude all ADAPSO members and other independent service organizations from all or a very substantial part of the market for the sale of data processing services."

The complaint goes on to allege that the plaintiff Data Systems had entered into negotiations in Minnesota with two particular potential customers to provide data processing service. It is stated that the defendant American National Bank and Trust Company subsequently made agreements with the same two potential customers for the performing of data processing service, thus depriving Data Systems of the right and opportunity to perform such service and to be compensated therefor.

ities in support thereof. *Rural Electrification Admin. v. Northern States Power Co.*, 373 F.2d 686, 692 (8th Cir. 1967). Quoted particularly in this case is *Dube v. Schuetzle*, 303 F.2d 570, 574 (8th Cir. 1962), to the effect that:

> "It has also been judicially determined that the Administrative Procedure Act was not designed to and in fact has not changed the basic principle that one must have suffered a *legal wrong* in order to have standing to challenge programs administered by governmental agencies. (Citing many cases.)"

The result is that in determining whether or not plaintiffs have standing this case must be considered without there being in existence any statutory right to judicial review. That is to say, the National Bank Act does not have within itself any provisions for court review, such for instance as the Internal Revenue Code or the Interstate Commerce Act, and it is clear that the Administrative Procedure Act does not and did not append such in effect to this Act so as to create a specific provision for judicial review.

There is a long and well established line of judicial authority holding that plaintiffs whose only injury is loss due to competition lack standing to maintain legal action to redress their economic injury. These decisions hold that mere competitive injury even though resulting from governmental action does not give standing to a person so injured to seek relief in the courts. *Alabama Power Co. v. Ickes*, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374 (1938); *Tennessee Power Co. v. T.V.A.*, 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940); *Kansas City Power & Light Company v. McKay*, 225 F.2d 924 (D.C. Cir. 1955), *cert. denied* 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed. 780 (1955); *Texas State AFL-CIO v. Kennedy*, 330 F.2d 217 (D.C. Cir. 1964); *Benson v. Schofield*, 236 F.2d 719 (D.C. Cir. 1956), *cert. denied* 352 U.S. 976; *United Milk Producers of New Jersey v. Ben-*

son, 225 F.2d 527 (D.C. Cir. 1955); *Pennsylvania Railroad Co. v. Dillon,* 335 F.2d 292 (D.C. Cir. 1964); *Rural Electrification Admin. v. Central Louisiana Elec. Co.,* 354 F.2d 859 (5th Cir. 1966).

So in *Tennessee Power Co. v. T.V.A.,* 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939), the court laid down the rule that one threatened with injury by governmental action may not contest such in the courts "unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."

Plaintiffs in the case at bar have not lost nor had threatened any property interest (loss due to competition clearly not qualifying as such under the above cases); they do not allege any contract breach nor tortious action and it is clear as above set forth that neither the National Bank Act nor the Administrative Procedure Act are statutes confering any specific privilege on plaintiffs. Plaintiffs do not have any governmentally granted license or franchise which is impaired by defendants' actions.

No purpose will be served in this opinion by reviewing the detailed facts of the above cited cases. Their rationale seems to be this: The United States is a country dedicated to free enterprise. If A invests his money in a business, a grocery store for instance,[4] he cannot complain legally if another man

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[4]In *Alabama Power Co. v. Ickes,* 302 U.S. 464, 481 (1938), the court said:

"John Doe, let us suppose, is engaged in operating a grocery store, Richard Roe, desiring to open a rival and competing establishment, seeks a loan from a manufacturing concern which, under its charter, is without authority to make the loan. The loan, if made, will be *ultra vires.* The state or a stockholder of the corporation, perhaps a creditor in some circumstances, may, upon that ground, enjoin the loan. But may it be enjoined at the suit of John Doe, a stranger to the corporation, because the lawful use of the money will prove injurious to him and this result is foreseen and expected both by the lender and the borrower, Richard Roe? Certainly not, unless we are prepared to lay down the general rule that A, who will suffer damage from the lawful act of B, and who plainly will have no case against B, may nevertheless invoke judicial aid to restrain a

B opens next door to him and he, A, loses his investment because of the competition. Economic injury due to competition is not an actionable legal wrong. Even assuming that B did not file proper incorporation papers or income tax returns, or borrowed his money fom someone who lent it to him ultra vires, or agreed to pay usurious interest for borrowed money, or obtained his groceries illegally, still A as a competitor has suffered no judicially cognizable wrong.[5] The above reasoning applies where the competitor is the United States Government, i.e., in the public power field or more frequently where the government has enhanced competition by financial aid or grants to a competitor, even though the government may not have followed to the letter all of the requirements, or may have exceeded the restrictions and proscriptions of the Act of Congress creating or permitting its action.[6]

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third party, acting without authority, from furnishing means which will enable B to do what the law permits him to do. Such a rule would be opposed to sound reason, as we have already tried to show, and cannot be accepted."

5 "The appellants further argue that . . . they may, by suit, challenge the constitutionality of the statutory grant of power the exercise of which results in competition. This is but to say that if the commodity used by a competitor was not lawfully obtained by it the corporation with which it competes may render it liable in damages or enjoin it from further competition because of the illegal derivation of that which it sells. If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is *ultra vires*, that there is a defect in the grant of powers to it, or that the *means of competition* were acquired by some violation of the Constitution. The contention is foreclosed by prior decisions that the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, and will not support a cause of action or a right to sue." *Tennessee Power Co. v. T.V.A.*, 306 U.S. 118, 139-40 (1939).

6 ". . . When Congress has not given them any such standing by express or implied provision of statute • • •, mere economic competition made possible by governmental action (even if allegedly illegal) does not give standing to sue in the courts to restrain such action. . . . For purposes of standing in this case, the sufficiency of appellants' allegations of 'legal wrong' thus depend upon congressional intent to bestow upon them a legal right to protection from such competition." *Pennsylvania Railroad Co. v. Dillon*, 335 F.2d 292, 294-95 (D.C. Cir. 1964).

A further reason sometimes assigned for denying standing is that to allow such would permit some citizen or taxpayer who claimed a "public interest" or who desired to act as a "private attorney general" to challenge in court every action of the government.

Less than a year ago the Court of Appeals for the Eighth Circuit in a lengthy opinion adopted the rationale of the above cited cases. *Rural Electrification Admin. v. Northern States Power Co.*, 373 F.2d 686 (8th Cir. 1967), *cert denied* 387 U.S. 945 (1967), 87 S.Ct. 2079, 18 L.Ed.2d 1332. This decision binds this court and thus requires a dismissal of plaintiffs' complaint.

Of the several cases relied on by plaintiffs, most of them are distinguishable and not applicable to the case at bar. Several relate to situations where the federal or state governments have recognized that a particular field of competition is subject to regulation and restriction as to the number who may engage in such business, i.e., where for the benefit of the public, totally free and unrestrained competition in the banking field, for instance, is not desirable and should be confined. So, when a plaintiff already has a license or franchise to engage in such a field of business, the prospective entry of another into the same field has been held to give plaintiff standing to demand judicial review. Accordingly standing has been allowed to challenge the Comptroller's action in chartering a new national bank or a new branch of a national bank. *National Bank of Detroit v. Wayne Oakland Bank*, 252 F.2d 537 (6th Cir. 1958); *Hoosier State Bank of Indiana v. Saxon*, 248 F. Supp. 233 (N.D. Ind. 1965); *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963); *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8th Cir. 1966). In these cases an existing bank was the challenger in a field where, for the benefit of the public, the number who are allowed in competition is limited. A grocery store or data processing company failure or bank-

ruptcy would be unfortunate and cause the proprietors and owners to lose their investment, but a bank failure would cause not only loss of the owner's investment but also loss to many unwary members of the public who are depositors. For this reason competition is limited as to the number who can engage in this business. Thus in the interest of the public one already in this field has standing to challenge a proposed new entrant.

In accordance with this same general philosophy is *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470, 60 S.Ct. 693, 83 L.Ed. 869 (1940), allowing a competing radio station standing in the public interest to challenge an order granting a certificate to a new station.

The case of *Georgia Ass'n of Ind. Ins. Agents, Inc. v. Saxon*, 260 F. Supp. 802 (N.D. Ga. 1966), involved a section of the National Bank Act (12 U.S.C. §92) permitting the sale of insurance by national banks located in towns of 5,000 population or less. Insurance agents were allowed standing judicially to question the Comptroller's ruling granting certain authority to write insurance by national banks in cities of any size, on the grounds that this statute by clear implication was intended to protect a class, i.e., certain insurance agents and representatives. Thus standing existed in any member of this class. There is no such statute protecting data processors.

In this same category is *Investment Company Institute v. Camp*, 274 F. Supp. 624 (D.D.C. 1967), where a national bank instituted a collective investment fund. Plaintiff association sought to restrain the Comptroller from authorizing such. Plaintiff was held to have standing in view of the specific wording of the National Bank Act which by its language segregated generally national commercial banking from the securities business, thus creating a protected class. Cf., *National Ass'n of Securities Dealers, Inc. v. Securities Exchange Commission* (Case #20,164, D.C. Cir. decided No-

vember 21, 1967), denying standing involving the same bank in a somewhat differing controversy.

As to *Baker, Watts & Co. v. Saxon,* 261 F. Supp. 247 (D.D.C. 1966), it can only be said that it seems contrary in its philosophy and holding to the Eighth Circuit holding in *Rural Electrification Admin. v. Northern States Power Co.,* 373 F.2d 686 (8th Cir. 1967), *cert. denied* 387 U.S. 945 (1967), 87 S.Ct. 2079, 18 L.Ed.2d 1332. Perhaps the same can be said of some of plaintiffs' other cases. Even those distinguished hereinabove fundamentally adopt or lean toward the *Baker, Watts, supra,* approach and rationale. *Webster Groves Trust Co. v. Saxon,* 370 F.2d 381 (8th Cir. 1966), as an Eighth Circuit case, predates *Rural Electrification Admin. v. Northern States Power Co., supra,* by slightly more than a year and though it has language which would seem to support plaintiffs' contentions, it was distinguished by the court itself in the *Rural Electrification Admin. v. Northern States Power Co.* case and classified as illustrative of the type of case where an existing licensee in a regulated competitive field has standing where it offers to prove detriment to the public interest by the potential entrance of a new competitor.

Certain other cases are difficult to reconcile. As stated in *Rural Electrification Admin. v. Northern States Power Co.,* 373 F.2d 686, 692 (8th Cir. 1967):

> "Although concepts of standing, judicial reviewability and justiciable controversy are intermingled in the area of administrative review, our analyses compels reversal under any or all of these jurisdictional bases. Appellees' brief well demonstrates isolated statements and cases dealing with agency review are not all simply reconciled. . . ."

There is the view relied on by plaintiffs that actions of government officials ought to be rather freely judicially reviewable; that public officials ought to be subject to some rein by

the court.[7] Davis in his textbook on ADMINISTRATIVE LAW, Chapter 22, and specifically §22.18 takes particular issue with the federal cases denying standing and sets forth in the Chapter numerous reasons therefor.

Apart from all of the above, the rule in this Circuit seems clear from the teachings of *Rural Electrification Admin. v. Northern States Power Co., supra.* Such binds this court.

A separate order granting defendants' motions to dismiss plaintiffs' complaint has been entered.

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[7] In *Whitney Nat'l Bank v. Bank of New Orleans,* 379 U.S. 411, 427, 85 S.Ct. 551, 13 L.Ed.2d 286 (1965), the dissenting justice (quoted in *Webster Groves Trust Co. v. Saxon, supra*) stated:

> ". . . absent a congressional design to bar all judicial review . . . injunctive relief is available where administrative remedies are either inapplicable or inadequate. This rule keeps the Comptroller from being a free-wheeling agency dispensing federal favors; and it gives some assurance that he will render principled decisions within the rule of law laid down by Congress."

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

NOTICE OF APPEAL BY ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., AND DATA SYSTEMS, INC.

Notice is hereby given that Association of Data Processing Service Organizations, Inc., and Data Systems, Inc., herewith appeals to the United States Court of Appeals for the Eighth Circuit from the Order entered by Honorable Philip Neville, United States District Judge, in this action, on January 9, 1968, and the judgment entered that date pursuant to said Order dismissing Plaintiffs' Complaint.

ASSOCIATION OF DATA PROCESSING SERVICE
ORGANIZATIONS, INC. AND DATA SYSTEMS, INC.
By SHANEDLING, PHILLIPS, GROSS & AARON
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/s/ BERT M. GROSS

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(Filed in the United States District Court, District of Minnesota, Third Division, on 1-17-68.)

(Opinion)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,218

Association of Data Processing Service Organizations, Inc., and Data Systems, Inc.,

Appellants,

vs.

William B. Camp, Comptroller of the Currency of the United States, and American National Bank and Trust Company,

Appellees.

Appeal from the United States District Court for the District of Minnesota.

[February 6, 1969.]

Before VOGEL, LAY and BRIGHT, Circuit Judges.

LAY, Circuit Judge.

Plaintiffs appeal from an order dismissing their complaint against the Comptroller of the Currency of the United States and the Minnesota domiciled American National Bank and Trust Company. One of the plaintiffs is Association of Data Processing Service Organizations, an incorporated association of data service organizations domiciled in Pennsylvania whose members perform data processing services throughout the United States. It is hereinafter referred to as ADAPSO. The other plaintiff, Data Systems, Inc., is a Minnesota cor-

poration engaged in the data processing business, with its principal place of business in Minneapolis. The complaint seeks equitable relief against the defendants and a "determination of the powers granted national banking associations under [the National Bank] Act as set forth in 12 U.S. Code §24." It is alleged that by administrative rule the Comptroller of the Currency has authorized national banks to perform data processing services for bank customers in violation of 12 U.S.C. §24 which gives national banks only "incidental powers as shall be necessary to carry on the business of banking." Plaintiffs allege that as a result of the unauthorized action ADAPSO members are threatened with the loss of a substantial part of the data processing market.[1] It is alleged that American National now performs data processing services for two companies with whom Data Systems had "negotiated" as prospective customers.

Jurisdiction is asserted by reason of an alleged federal question arising under the banking laws of the United States. 12 U.S.C. §§ 21 et seq. The trial court dismissed plaintiffs' complaint for lack of jurisdictional standing. We affirm.

The question of standing serves as a test of federal jurisdiction. Standing is the constitutional prerequisite related to whether a justiciable "case or controversy" exists. Involved is an examination to determine whether the plaintiffs have a personal stake legally sufficient "to assure that concrete adverseness" which avoids merely abstract determinations. *Flast v. Cohen,* 392 U.S. 83 (1968). See also *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227 (1937). Justiciability, although not always related to standing, becomes definitely attached when we consider whether the legal relation-

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[1]We need not decide whether ADAPSO as an association can properly allege "loss of competition" on behalf of its members when it is not engaged in the data processing business itself. See discussion, Jaffe, Judicial Control of Administrative Action 542-43 (1965).

ships of parties are such that they are aligned with adverse legal interests.

Plaintiffs assert standing in that they have been and will continue to be economically injured by *illegal* competition of the national banks. Whether a litigant has standing to challenge competitive injury has been the subject of extended litigation and discussion. Doctrinal rules have developed a maze of conceptualistic abstractions and theories which at times are viewed and applied as being indistinguishable one from another. See *Baker, Watts & Co. v. Saxon*, 261 F.Supp. 247 (D.D.C. 1966), aff'd sub nom., *Port of N. Y. Authority v. Baker, Watts & Co.*, 392 F.2d 497 (D.C. Cir. 1968); *Saxon v. Georgia Ass'n of Ind. Ins. Agents, Inc.*, 399 F.2d 1010, 1019 (5 Cir. 1968) (concurring opinion).[2]

The trial court here has observed that language in *Rural Elec. Admin. v. Northern States Power Co.*, 373 F.2d 686 (8 Cir. 1967) (denying standing)[3] and in *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8 Cir. 1966) (allowing standing)[4] seems to state divergent principles, either of which could govern in the instant case. However, all legal principles must be qualitatively analyzed within the context of factual surroundings. Much of the confusion on standing seems to arise from the emphasis upon the issues to be adjudicated or upon the possible merits of the substantive claim rather than upon an examination of the *status* of the

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[2]See also extended discussion in 3 Davis, Administrative Law 208-294 (1958); Jaffe, Judicial Control of Administrative Action 500-531 (1965). And more recently, Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601 (1968).

[3]We stated in *Northern States*, 373 F.2d 692:

"Appellees readily recognize that the interest of the economic competitor is not sufficient standing to challenge the authority or discretion of the Administrator to make loans."

[4]We stated in *Webster Groves*, 370 F.2d 388:

"[W]hen a competitor believes he is being subjected to illegal competition owing to impropriety by the Comptroller, the courts should be open to hear and decide the alleged wrong."

complaining plaintiff. Whether or not a defendant is alleged to be engaged in illegal competition cannot by itself determine a plaintiff's standing to complain. Cf. *Chicago v. Atchison, T. & S. F. Ry.*, 357 U.S. 77 (1958), and note 8 infra. Chief Justice Warren has stated, "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." However, he added, ". . . it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99, 102 (1968).

Whether a party may or may not challenge allegedly illegal competition by others is best evaluated by examining the various factual circumstances within which the courts have discussed a particular plaintiff's standing and competitive injury.

Perhaps most well known are the so-called "power cases," where the threatened economic loss arises from government-created competition. In these situations the embryo of the competition by the defendant is generally found in congressional legislation. But even though the validity of such legislation is challenged, or an attack is made on the authority of a government agent to loan money, the courts uniformly have denied standing to competitors who otherwise possess no legal right to be free from competition.[5] This group of cases is represented by *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 137 (1939), which early emphasized:

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[5]In addition, even though the attack upon a government program to loan money is alleged to be illegal, this does not make the competition itself legally wrong. This is explained because "the borrower owes him [the plaintiff] *no obligation* to refrain from using the proceeds in any lawful way the borrower may choose." *Alabama Power Co. v. Ickes*, 302 U.S. 464, 480 (1938). (Emphasis ours.)

"The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. The principle is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."

See also *Rural Elec. Admin. v. Northern States Power Co.*, supra.

Secondly, in contrast to the "power" cases are situations where a plaintiff, possessing a public grant or contract to operate, seeks to prevent a competitor from entering into an area of regulated and *restricted* competition. Representative of these cases is *Frost v. Corporation Comm'n*, 278 U.S. 515 (1929). This court has applied the rationale of *Frost* to a suit by a state bank against the Comptroller to prevent illegal competition. *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8 Cir. 1966). As observed in *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963), rev'd on other grounds, 379 U.S. 411 (1965), involved is a property right arising out of a public charter which bestows a *legal* interest on a state bank to complain.[6]

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[6]The branch banking provisions of the National Bank Act make the establishment of branch banks subject to the law of the states. 12 U.S.C. §36. A primary purpose in doing so is to ensure competitive equality between state and national banks. *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966). It has accordingly been held that this provision gives state banks a sufficient legal interest to provide them with statutory standing to challenge the legality of branching by national banks. See *National Bank v. Wayne Oakland Bank*, 252 F.2d 537 (6 Cir. 1958), discussed in *Hoosier State Bank v. Saxon*, 248 F.Supp. 233 (N.D. Ind. 1965). The contrast between basing a state bank's standing on a "property right" arising out of its charter and standing by reason of its inclusion within the class intended to be protected by the National Bank Act is one without essential difference. Perhaps the most realistic approach is that the right indigenous to the charter is protected by the statute.

Closely related but significantly different are those cases involving areas of competition which because of public interest find need of public licensing as opposed to a public grant or contract.[7] Here plaintiff-competitors are considered to be without a private "legal right" to protest unauthorized competition but nevertheless find standing by specific legislation as "aggrieved persons" to act in the public interest. See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942). Cf. *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). In these cases *Congress* has patently recognized need for judicial review

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[7]The Court stated in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 at 474 (1940):

> "In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.
>
> "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured the Act contemplates inquiry by the Commission, *inter alia*, into an applicant's financial qualifications to operate the proposed station.
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> "But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel."

even though the competitive business controlled is considered free and otherwise unrestricted.[8]

Fourth, there are situations where competitors are given standing to challenge competition which is allegedly in violation of a statute, where the statute itself is said to be enacted for the express protection of the class of competitor complaining. The most recent example of these cases is found in *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968).[9] Plain-

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[8]But cf. *Chicago v. Atchison, T. & S. F. Ry.*, 357 U.S. 77 (1958). The Supreme Court recognized standing of a municipal licensed public transportation system to intervene and attack the entry of one seeking to compete in an alleged violation of a city ordinance. The Court made clear that standing of the intervenor could not be viewed from examination of the merits as to whether in fact the competition was or was not illegal. Parmelee, the intervenor, for many years had enjoyed an arrangement with the railroad to transport passengers between stations. Parmelee was notified of its termination. A competitor, Railroad Transfer Service, was subsequently given this business notwithstanding a city ordinance that prohibited it from doing so without a license from the city. The Court found that Parmelee had "a direct and substantial personal interest in the outcome" and allowed standing. The ordinance was then held unconstitutional as being repugnant to the Interstate Commerce Act and the intervenor lost.

This case may best be categorized with those instances where standing to challenge illegal competition is implicitly found within a legislative enactment, be it an existing ordinance or statute, valid or not. Cf. *Alton R.R. v. United States*, 315 U.S. 15, 19 (1942).

[9]The Supreme Court said:

"This Court has, it is true, repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations. *Railroad Co. v. Ellerman*, 105 U.S. 166 (1882); *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938); *Tennessee Power Co. v. TVA*, 306 U.S. 118 (1939); *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). But competitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury. In contrast, it has been the rule, at least since the *Chicago Junction Case*, 264 U.S. 258 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision. See *Alton R. Co. v. United States*, 315 U.S. 15, 19 (1942); *Chicago v. Atchison, T. & S. F. R. Co.*, 357 U.S. 77, 83 (1958).

tiffs' reliance on recent cases against the Comptroller fall within facile classification of this rule. See, e.g., *Baker, Watts & Co. v. Saxon*, 261 F. Supp. 247, supra, as explained in *Investment Co. Institute v. Camp*, 274 F. Supp. 624, 636 (D.D.C. 1967); *Saxon v. Georgia Ass'n of Ind. Ins. Agents, Inc.*, 399 F.2d 1010 (5 Cir. 1968).[10]

Fifth, the last group of "competition" cases relates to a plaintiff's unsuccessful challenge of a competitor's alleged *ultra vires* acts affecting plaintiff's non-regulated area of commerce. This factual setting is best illustrated by *Railroad Co. v. Ellerman*, 105 U.S. 166 (1882). In that case the plaintiff, who had contracted with the city of New Orleans to collect revenue from users of the city wharves, sought to enjoin a railroad company from operating wharves in New Orleans. He alleged this action would constitute illegal competition because the state statute authorizing the company to operate wharves was unconstitutional. The principle here furnishes an analogue to that in the "power cases" where the conduct of the defendant, although alleged to be illegal is nevertheless considered "lawful" with respect to

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"Petitioners concede, as of course they must, that one of the primary purposes of the area limitations in §15d of the Act was to protect private utilities from TVA competition." *Hardin v. Kentucky Util. Co.*, 390 U.S. at 5-6.

[10]We do not share confidence in the alternative holding in *Saxon v. Georgia Ass'n of Ind. Ins. Agents, Inc.*, 399 F.2d 1010 (5 Cir. 1968), that outside the "statutory aid to standing" plaintiffs had "a legal right to protect themselves from unlawful competition." Id. at 1018. The emphasis that plaintiff's standing arises out of the allegation of "unlawful competition" as contrasted to "lawful competition" seemingly relates standing to the merits of the claim to be adjudicated rather than the status of a party to complain. For a similar critique, see Judge Thornberry's concurring opinion, 399 F.2d at 1020, n. 3.

the plaintiff because of the total absence of legal interest found in plaintiff's status.[11]

In summary, a plaintiff may challenge alleged illegal competition when as complainant it pursues (1) a legal interest by reason of public charter or contract, *Frost v. Corporation Comm'n*, supra, (2) a legal interest by reason of statutory protection, *Baker, Watts & Co. v. Saxon*, supra, or (3)

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[11]This is explained by Mr. Justice Matthews in *Railroad Co. v. Ellerman*, 105 U.S. at 173-174:

"The sole remaining question, then, is whether Ellerman, as assignee of the city, has any legal interest which entitled him to enjoin the company from using its wharf as a public wharf beyond the limits of such use, as defined by that construction of the joint resolution. If he has such interest, it can only consist in preventing competition with himself as a wharfinger, which such more extensive use of the railroad property would create. And if the right to assert it exists, it must rest, not upon the claim that the premises are thus used for purposes to which they might not be lawfully devoted if owned and used by a natural person, but on the allegation merely that such use is beyond the corporate powers of the company. But if the competition in itself, however injurious, is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting *ultra vires*? The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for any one to compete with the company, although the latter may not be authorized to engage in the same business. *The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty.* A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in preventing the usurpation and perversion of its franchises, because it is a trustee of its powers for uses strictly public. In these questions the appellee has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed." (Emphasis ours.)

a "public interest" in which Congress has recognized the need for review of administrative action and plaintiff is significantly involved to have standing to represent the public, *FCC v. Sanders Bros. Radio Station*, supra. From this analysis, it seems clear that an allegation of "illegal competition" is not the balancing determinant of a plaintiff's standing. The primary search must rest on whether the plaintiff's status is one which enjoys a private interest entitled to protection or is one which the law recognizes to be of such legal significance to allow a party to act as a public representative for a public interest.

In the instant case the facts clearly place plaintiffs outside those cases which recognize standing. Plaintiffs are competing in a non-regulatory field of free competition. They possess no private legal interest nor do they plead any legal harm which is recognized at law. Their status is not one which places them within a class designedly protected by statute.[12] In direct accord see *Wingate Corp. v. Industrial Nat'l Bank*, 288 F. Supp. 49 (D.R.I. 1968); *Arnold Tours, Inc. v. Camp*, 286 F. Supp. 770 (D. Mass. 1968).

Plaintiffs' argument is in essence an equitable plea, that in effect they have a personal stake to pursue, even though not a legal one, but nevertheless one which makes them logical parties to protect the public interest from illegal actions of government agencies.

The problem with their plea is many-fold. Congress has not seen fit within the National Bank Act to recognize any

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[12]The Bank Act has never been construed to give a private litigant standing to complain concerning *ultra vires* acts of national banks relating to executed contracts. See *National Bank v. Matthews*, 98 U.S. 621 (1878). Although distinctive policy arguments exist for this rule, nevertheless there exists no legislative history nor do plaintiffs offer any serious contention that the National Bank Act was intended to give these private litigants standing to litigate alleged *ultra vires* activities of national banks. The reliance on the Bank Holding Company Act of 1966 and the Bank Service Corporation Act is misplaced. Neither act is applicable here.

"aggrieved person" to assert the public's rights. Congress has not expressed a public concern for protection as found in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), and its progenitors. Without a legal interest or the status of a recognized "aggrieved" party, the complaint resolves itself into an attempt merely to show "a common concern for obedience to law." *L. Singer & Sons v. Union Pac. R.R.*, 311 U.S. 295, 304 (1940). As pronounced in *Singer*, outside statutory consent, the general or common interest can find protection only in the standing granted to public authorities. Unless a relevant statute provides for a "party in interest" to seek judicial review or unless a complainant possesses a recognized legal interest, he lacks standing to be a "private attorney general" to represent the public interest. See *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir. 1955); *Braude v. Wirtz*, 350 F.2d 702, 707, 708 (9 Cir. 1965).[13]

Mr. Justice Frankfurter best describes judicial obligation to avoid review when legal standing is not otherwise involved:

> "The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a 'case or controversy.' The scope and consequences of the review with which the judiciary is entrusted over executive and legislative action require us to observe these bounds fastidiously." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 150 (1951) (concurring opinion).

Judgment affirmed.

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[13]See also our prior discussions concerning the applicability of the Administrative Procedure Act in *Rural Elec. Admin. v. Northern States Power Co.*, 373 F.2d at 692, n. 9.

(Judgment)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19218. September Term, 1969

Association of Data Processing Service Organizations, Inc., and Data Systems, Inc.,

Appellants,

vs.

William B. Camp, Comptroller of the Currency of the United States, and American National Bank and Trust Company,

Appellees.

Appeal from the United States District Court for the District of Minnesota

---

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here Ordered and Adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

February 6, 1969.

Costs taxed in favor of appellee American Natl. Bank & Trust Co. for printing brief—$98.00.

Costs taxed in favor of appellee Wm. B. Camp, Comptroller, etc., for printing brief & suppl. brief & Appendix—$32.96.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

No. 1246

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,
Petitioners,

vs.

WILLIAM B. CAMP, Comptroller of the Currency of the United States, and AMERICAN NATIONAL BANK AND TRUST COMPANY,
Respondents.

ORDER

The petition for a writ of certiorari is granted and the case is placed on the summary calendar.

FILE COPY

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In The

Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted] 85

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,

Petitioners,

vs.

WILLIAM B. CAMP, Comptroller of the Currency of the United States, and AMERICAN NATIONAL BANK AND TRUST COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In The

Supreme Court of the United States

OCTOBER TERM, 1969

No.....

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,
Petitioners,

vs.

WILLIAM B. CAMP, Comptroller of the Currency of the United States, and AMERICAN NATIONAL BANK AND TRUST COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on February 6, 1969.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court, printed in Appendix A hereto, *infra*, pp. 13-22, is reported in 279 F.Supp. 675. The opinion of the Court of Appeals is presently unreported and is printed in Appendix B hereto, *infra*, pp. 23-33.

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1969 (R. 12 and Appendix C) The jurisdiction of this Court is invoked under 28 U.S.C. §1254. The jurisdiction of the District Court was invoked by reason of a federal question arising under the National Bank Act, 12 U.S.C. §§ 21, et seq.

QUESTION PRESENTED FOR REVIEW

Whether independent data processing service organizations, whose sole business is to provide data processing services for the general business public, have standing to assert a claim that national banks are illegally offering competing data processing services.

STATUTES INVOLVED

The statutory provisions involved are portions of the Bank Service Corporation Act, 76 Stat. 1132, 12 U.S.C. 1861-1865 (Supp. V, 1964), National Bank Act, 12 U.S.C. §24, and the Administrative Procedure Act, 5 U.S.C. §702, which are printed in Appendix D hereto, *infra*, p. 35.

STATEMENT OF THE CASE

As petitioners' complaint was dismissed by the District Court on motion before trial and before any information was obtained by any party in pre-trial discovery proceedings, this statement of the case is necessarily limited to the pleadings on file (R. 1-11).

Petitioners are the Association of Data Processing Service Organizations, Inc. (referred to as "ADAPSO"), and an individual member of that Association (referred to as "Data Systems"). The members of ADAPSO are engaged in the business of performing data processing services for the general business community. For some time, the respondent

American National Bank and Trust Company of St. Paul, Minnesota, a national bank (referred to as "American Bank"), has been similarly engaged in the business of performing data processing services for the general business community. In fact, respondent American Bank, at the time petitioners began their action, was performing or preparing to perform such services for the Minnesota State Capitol Credit Union, with whom petitioner Data Systems had contracted to perform such services, and for Carlen Industries, Inc., with whom Data Systems had been negotiating regarding such services. Petitioners brought this action to have American Bank's data processing activities of this nature declared unlawful, to have them enjoined, and for damages resulting from these illegal activities.

Petitioners also sought declaratory and injunctive relief against the respondent Comptroller of the Currency (the "Comptroller"), as he had purported to authorize such activities in his 1966 ruling, which stated as follows:

> "Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers." *Comptroller's Manual* (October 15, 1966 ed.), par. 3500.

Petitioners have alleged, and for purposes of this petition these allegations must be accepted, that these activities by the American Bank and the above ruling by the Comptroller are illegal under the National Bank Act, United States Code, Title 12, Chapter 2, and that if these activities are continued under the umbrella of this ruling they will cause substantial and irreparable harm to petitioners.

Prior to trial, respondents moved to dismiss the complaint on the grounds that petitioners lacked standing to maintain this action. The District Court granted the motion, and the Court of Appeals affirmed the judgment of dismissal.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in the present case directly and irreconcilably conflicts with the decision of the Court of Appeals for the First Circuit in *Wingate Corp. v. Ind. Nat. Bank*, No. 7186, decided March 27, 1969, attached hereto as Appendix E (p. 36, *infra*).

In the *Wingate Corp.* case, the First Circuit reversed the District Court decision (286 F.Supp. 770, D.Mass. 1968) that had held the plaintiff to be without standing. It was the District Court decision in *Wingate Corp.* which the Eighth Circuit cited as being in "direct accord" with its decision in the present case (App. B, p. 23, *infra*). That District Court decision has now been reversed by the First Circuit, creating the conflict with the Eighth Circuit.

The two cases are indistinguishable. In each, the plaintiff is a corporation involved in performing data processing services. In each, the defendants include a national bank and the Comptroller of the Currency. In each, the suit was to enjoin the national bank from performing data processing services for outside customers pursuant to authorization by the Comptroller. In each, the District Court dismissed the complaint before trial on the grounds of lack of standing. But the Eighth Circuit has affirmed its lower court action, while the First Circuit has reversed the decision of its District Court.

Not only are the two *decisions* diametrically opposed, but the two *opinions* set forth explicitly the divergent thinking that led to the contrary results. The First Circuit Court writes cogently and at length in support of its conclusion that statutory aid to standing is found in the Bank Service Corporation Act, 76 Stat. 1132, 12 U.S.C. 1864 (App. E, pp. 44-46, *infra*). By contrast, although petitioners argued at length in their brief before the Eighth Circuit that the Bank Service Corporation Act gave them standing, that Court of

Appeals rejected the argument in a footnote (App. B, fn. 12, *infra*, p. 32).

The reasoning of the First Circuit appears far more persuasive than the summary rejection of petitioners' position by the Eighth Circuit. Be that as it may, this square conflict, on an issue that is obviously of widespread importance, cannot be allowed to stand. It is not possible for the national banking system to function satisfactorily while this conflict remains unresolved.

2. The decision of the Court of Appeals in the present case is also directly in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Saxon v. Georgia Ass'n of Ind. Ins. Agents, Inc.*, 399 F.2d 1010 (1968).

The *Insurance Agents* case is indistinguishable in principal from the present action. The plaintiffs were an association of independent insurance agents and individual members of the association. The defendants were a national bank and the Comptroller of the Currency. The action was to enjoin the national bank from engaging in the insurance business in cities of over 5,000 population and to invalidate the Comptroller's ruling which had authorized such activity.

Defendants raised the question of plaintiffs' standing to maintain the action, and the Court of Appeals held, contrary to the decision in the present case, that plaintiffs did have standing:

> "We find no fault with appellants' argument that the plaintiffs in the court below, who are licensed, professional insurance agents, have no legal right to be free from lawful competition by other licensed agents who are lawfully and properly empowered to engage in the insurance business, but they do have a legal right to be protected from *unlawful* competition by national banks." (399 F.2d at 1016.)

The court below recognized the conflict between its decision and that of the Fifth Circuit in the *Insurance Agents*

case, although its consideration of the latter case was once again limited to a footnote. (App. B, fn. 10, *infra*, p. 30.)

It is apparent from a review of the two cases that if the present petitioners had brought their action within the jurisdiction of the Fifth Circuit they would have prevailed upon the question of standing. It is a basic responsibility of the Supreme Court to eliminate such conflicts among the Courts of Appeals.

3. The question presented is of major importance, involving unsettled questions regarding the federal law of standing affecting a large class of potential litigants besides the immediate parties. The issue is whether competitors of national banks have standing to challenge allegedly illegal action by these banks and by the Comptroller of the Currency.

In recent years, national banks have invaded various fields of business activity not previously thought of as being encompassed within the business of banking. For example, banks have entered the data processing business (the present case and the *Wingate Corp.* case), the insurance business (the *Insurance Agents* case), the travel agency business (*Arnold Tours, Inc. v. Camp*, No. 7192, 1st Cir., March 27, 1969), the business of dealing in revenue bonds (*Baker, Watts & Co. v. Saxon*, 261 F.Supp. 247 (D.D.C. 1966), *aff'd sub. nom. Port of New York Authority v. Baker, Watts & Co.*, 392 F.2d 497 (D.C. Cir. 1968)), and the investment fund business (*Investment Co. Institute v. Camp*, 274 F.Supp. 624 (D.D.C. 1967)). In all of these cases, the questioned activities have been approved by the Comptroller of the Currency, the federal official responsible for supervising and controlling national bank activities. As the Comptroller has shown no inclination to restrict national banks from entering these fields, it has fallen to competitors in each area to bring the question of the legality of such bank activities to the courts. In each instance, the question of standing has been raised by

the defendant bank and the Comptroller. In three cases (*Baker, Watts*—revenue bonds; *Investment Co. Institute*—investment funds; *Georgia Insurance Agents*—insurance) the courts have held that a competitor has standing. In *Arnold Tours* (travel agency) the court held a competitor to be without standing. In the data processing field, as noted before, the courts have disagreed.

Such divergent treatment of the threshold question of standing in turn creates major uncertainties as to the substantive question of the rights of national banks to engage in these particular business activities. It is noteworthy that in each case cited earlier where the court *has* found standing and thus reached the substantive question, the bank activity and Comptroller's ruling have been held illegal.

4. The question here presented, although of major significance in relation to the field of banking, has, in addition, far broader implications extending throughout the entire area of federal jurisdiction. The wider issue involves problems of the extent to which a competitive interest supports standing to litigate questions of alleged illegal government action adversely affecting that competitive interest.

At present, federal law relating to this aspect of standing has not been resolved in a satisfactory manner.

> "Probably the largest category of cases that would be affected by interpreting the APA to confer standing on persons adversely affected would be the miscellaneous holdings that a competitive interest is not a basis for standing. Of the cases on this question during the past five years, perhaps about three-quarters uphold standing and only about a quarter deny standing. If the decisions are based on a rational principle explaining why a competitive interest sometimes supports standing and sometimes not, then changing the result in the quarter of the cases denying standing might be undesirable. Does the case law rest on some rational principle?

> "The answer is no, except to the extent that many cases do uphold standing when a statute indicates an intent to protect a competitive interest. In absence of such legislative intent, the results are largely fortuitous, as I shall try to demonstrate." Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 Chi. L. Rev. 601, 625 (1968).

Certainly, it is undesirable that the outcome of litigation in this area (or in any, for that matter) should depend on "fortuitous" circumstances. One of the primary responsibilities of the Supreme Court should be to establish guidelines for lower federal courts in the area of federal jurisdiction. This case represents an important and urgent opportunity to establish such guidelines.

Another commentator has reached the same conclusion as Professor Davis regarding the question involved in this case:

> "Clearly this area of the law is unsettled. The narrow 'legal wrong' rule of *Tennessee Electric* is still cited as authoritative in nonstatutory standing cases, but some courts have avoided the rule by stretching the statutes to find a congressional intent to protect the plaintiff from competition. The result, as the banking cases illustrate, is that similar cases produce opposite results in different courts. There probably will be no reconciliation of the divergent views in these cases until the Supreme Court has directly considered the continued validity of the *Tennessee Electric* doctrine and has decided the effect of the Administrative Procedure Act on the class of persons entitled to judicial review of administrative action." Note, *Diversification by National Banks*, 21 Stan. L. Rev. 650, 669 (1969).

The Note quoted above refers to certain subsidiary issues involved in the major question presented. The continued validity or applicability of *Tennessee Power Co. v. TVA*, 306 U.S. 118 (1938), in the law of standing must be considered. This Court in *Flast v. Cohen*, 392 U.S. 83 (1968), recently found it desirable to reconsider and partially overrule the earlier doctrine of *Frothingham v. Mellon*, 262 U.S. 447

(1923), regarding the standing of federal taxpayers to sue as taxpayers. Similarly, it is appropriate after thirty years to consider the extent to which the doctrine of the *Tennessee Power* case should continue to be viable.

Re-examination of *Tennessee Power* is especially appropriate in view of the approach taken in that case to the question of standing as contrasted with the approach recently adopted by this Court in *Flast v. Cohen.* In *Tennessee Power,* the Court took the conceptualistic, and perhaps circular, approach that a plaintiff's standing depends on the invasion of "legal rights" (306 U.S. 137). The *Flast* opinion, to the contrary, approaches the problem of standing in terms of realistic, factual considerations:

> "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" (88 S.Ct. 1952.)
>
> * * * * *
>
> "Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." (88 S.Ct. 1953.)
>
> * * * * *
>
> "There remains, however, the problem of determining the circumstances under which a federal taxpayer will be deemed to have the personal stake and interest that imparts the necessary concrete adverseness to such litigation so that standing can be conferred on the taxpayer *qua* taxpayer consistent with the constitutional limitations of Article III." (88 S.Ct. 1953.)

This Court should now re-examine the question of the standing of a competitor in terms of the realistic, factual approach utilized in *Flast* rather than in terms of the concep-

tualistic, doctrinaire "legal rights" approach utilized in *Tennessee Power.*

5. The present case also directly poses the important and unresolved question whether the common law of standing has been changed by the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §702 (Supp. II, 1967), which states that:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

The Supreme Court has never determined whether this statutory language has enlarged the previous common law restrictions in the law of standing. Lower federal courts have disagreed on the question. Davis, *Standing: Taxpayers and Others,* 35 Chi. L. Rev. 601, 619-23 (1968); Note, *Diversification by National Banks,* 21 Stan. L. Rev. 650, 665-66 (1969). The instant case presents this issue in sharp focus and for this reason, aside from the others discussed previously, the present case should be reviewed. (This particular point was not argued in the court below as the Eighth Circuit has consistently held that the Administrative Procedure Act did not enlarge the scope of the prior law of standing, *Rural Elec. Admin. v. Northern States Power Co.,* 373 F.2d 686, 692 (1967). Other courts have held to the contrary, e.g., *American President Lines v. Federal Maritime Board,* 112 F. Supp. 346, 348-49 (D.D.C. 1953)).

CONCLUSION

Because of the direct conflicts between the decision of the court below and those of the First Circuit in the *Wingate Corp.* case and Fifth Circuit in the *Georgia Insurance Agents* case, and because of the importance of the question presented, both as it affects banking activities specifically and the federal law of standing in general, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[OPINION]

Shanedling, Phillips, Gross & Aaron by Bert M. Gross and Felix M. Phillips, Esqs., appeared for plaintiffs.

Patrick J. Foley, United States Attorney, by Stanley H. Green, Esq., and C. Westbrook Murphy, Esq., of the Department of Justice, Washington, D. C., appeared for defendant Comptroller William B. Camp.

Kelly, Segell and Fallon by Fallon Kelly and Hyam Segell, Esqs., appeared for defendant American National Bank & Trust Company.

Matthew Hale, Esq., Washington, D. C., petitioned for leave to appear and file a brief amicus curiae on behalf of and as general counsel for The American Bankers Association, which petition the court granted.

NEVILLE, District Judge.

This matter comes before the court on motions by both defendants for an order of dismissal, grounded upon the alleged lack of standing in the plaintiffs to maintain the present action. Plaintiffs' complaint seeks a declaratory judgment, an injunction and compensatory damages, all on the theory that the marketing of data processing[1] to the public by defendant American National Bank is illegal and contrary to law. The complaint further avers that certain actions of the defendant Comptroller in approving the marketing of data processing services by national banks is "arbitrary, capricious, an abuse of discretion, in excess of statutory authority and illegal." The plaintiffs in essence seek a determination that the performing for a fee of data process-

---

[1]As brought out in the oral arguments, data processing utilizes electronic devices, including what are commonly known as computers, to compile and calculate statistical information and is employed by businesses in the computation and preparation of payrolls, tax returns, monthly statements, bills and in other ways.

ing services by national banks for the public generally, or what were referred to on oral argument as "outsiders," is not within the scope of the powers and authority granted national banks under the National Bank Act as set forth in 12 U.S.C. §24. The pertinent provisions of this statute read as follows:

"§24. Corporate powers of associations.

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

. . .

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, *all such incidental powers as shall be necessary to carry on the business of banking;* . . ." (Emphasis added.)

The allegation in the complaint as to the defendant Comptroller's administrative ruling is in general terms as follows:

"7. The defendant COMPTROLLER has by ruling and other administrative action authorized defendant AMERICAN BANK and other national banks to perform the data processing services hereinafter described."[2]

---

[2]It appears from the brief submitted by the Comptroller that his position with respect to the furnishing of electronic data processing services by national banks was published as an interpretive ruling in the March 1964 supplement to the *Comptroller's Manual for National Banks*, paragraph 3500 of which reads as follows:

"A national bank may make available for the use of others processing equipment acquired for the primary purpose of performing service incidental to banking."

A later modification of this same paragraph, adhered to by the present Comptroller, appears in the *Comptroller's Manual* (October 15, 1966 ed.) in the following language:

"Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers."

ocessing Service Or-

The plaintiff Association of Data P incorporated associa-
ganizations, Inc. ("ADAPSO"), is an ions located through-
tion of data processing service organiza are engaged in the
out the United States whose member rvice to the business
business of providing such type of se c. is a Minnesota cor-
community. Plaintiff Data Systems, In innesota, engaged in
poration with offices in Minneapolis, M ning data processing
the business of marketing and perfor nity, and is a member
service for the general business commu
of ADAPSO.

The alleged injury to these plaintif fs resulting from the
actions of the defendants is claimed to be solely an economic
injury arising from what is contended to be illegal competi-
tion.[3]

The plaintiffs assert that they have standing to challenge
the action of the Comptroller by virtu le of Section 10 of the
Administrative Procedure Act, 5 U.S .C. §701, et seq. The
pertinent section of this Act, §702, pr ovides that:

"A person suffering legal wrong because of agency ac-
tion, or adversely affected or aggrieved by agency ac-

---

[3]Paragraph 11 of the complaint of plaintiffs charges:

"As a result of defendant Comptroller's action, the marketing of data processing services by national banks has been growing rapidly, and is anticipated to grow even more rapidly in the future. Because of the enormous financial power of national banks and their banking relationships with existing and potential customers for such services, the marketing of such services by national banks threatens ulitmately to exclude all ADAPSO members and other independent service organizations from all or a very substantial part of the market for the sale of data processing services."

The complaint goes on to allege that the plaintiff Data Systems had entered into negotiations in Minnesota with two particular potential customers to provide data processing service. It is stated that the defendant American National Bank and Trust Company subsequently made agreements with the same two potential customers for the performing of data processing service, thus depriving Data Systems of the right and opportunity to perform such service and to be compensated therefor.

> tion within the meaning of a relevant statute, is entitled to judicial review thereof. . . ."

Since there are no specific provisions in the National Bank Act providing for a review of the Comptroller's rulings or conferring standing to maintain such actions as the instant case, it would appear that if the plaintiffs are to have what is called statutory standing at all, such must be grounded upon the above-quoted portion of the Administrative Procedure Act. The Eighth Circuit Court of Appeals, however, has adhered strongly to the view that the Administrative Procedure Act did not by its passage create any legal rights which did not otherwise exist and has cited numerous authorities in support thereof. *Rural Electrification Admin. v. Northern States Power Co.*, 373 F.2d 686, 692 (8th Cir. 1967). Quoted particularly in this case is *Dube v. Schuetzle*, 303 F.2d 570, 574 (8th Cir. 1962), to the effect that:

> "It has also been judicially determined that the Administrative Procedure Act was not designed to and in fact has not changed the basic principle that one must have suffered a *legal wrong* in order to have standing to challenge programs administered by governmental agencies. (Citing many cases.)"

The result is that in determining whether or not plaintiffs have standing this case must be considered without there being in existence any statutory right to judicial review. That is to say, the National Bank Act does not have within itself any provisions for court review, such for instance as the Internal Revenue Code or the Interstate Commerce Act, and it is clear that the Administrative Procedure Act does not and did not append such in effect to this Act so as to create a specific provision for judicial review.

There is a long and well established line of judicial authority holding that plaintiffs whose only injury is loss due to competition lack standing to maintain legal action to redress

their economic injury. These decisions hold that mere competitive injury even though resulting from governmental action does not give standing to a person so injured to seek relief in the courts. *Alabama Power Co. v. Ickes,* 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374 (1938); *Tennessee Power Co. v. T.V.A.,* 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939); *Perkins v. Lukens Steel Co.,* 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940); *Kansas City Power & Light Company v. McKay,* 225 F.2d 924 (D.C. Cir. 1955), *cert. denied* 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed. 780 (1955); *Texas State AFL-CIO v. Kennedy,* 330 F.2d 217 (D.C. Cir. 1964); *Benson v. Schofield,* 236 F.2d 719 (D.C. Cir. 1956), *cert. denied* 352 U.S. 976; *United Milk Producers of New Jersey v. Benson,* 225 F.2d 527 (D.C. Cir. 1955); *Pennsylvania Railroad Co. v. Dillon,* 335 F.2d 292 (D.C. Cir. 1964); *Rural Electrification Admin. v. Central Louisiana Elec. Co.,* 354 F.2d 859 (5th Cir. 1966).

So in *Tennessee Power Co. v. T.V.A.,* 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939), the court laid down the rule that one threatened with injury by governmental action may not contest such in the courts "unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."

Plaintiffs in the case at bar have not lost nor had threatened any property interest (loss due to competition clearly not qualifying as such under the above cases); they do not allege any contract breach nor tortious action and it is clear as above set forth that neither the National Bank Act nor the Administrative Procedure Act are statutes conferring any specific privilege on plaintiffs. Plaintiffs do not have any governmentally granted license or franchise which is impaired by defendants' actions.

No purpose will be served in this opinion by reviewing the

detailed facts of the above cited cases. Their rationale seems to be this: The United States is a country dedicated to free enterprise. If A invests his money in a business, a grocery store for instance,[4] he cannot complain legally if another man B opens next door to him and he, A, loses his investment because of the competition. Economic injury due to competition is not an actionable legal wrong. Even assuming that B did not file proper incorporation papers or income tax returns, or borrowed his money from someone who lent it to him ultra vires, or agreed to pay usurious interest for borrowed money, or obtained his groceries illegally, still A as a competitor has suffered no judicially cognizable wrong.[5] The

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[4] In *Alabama Power Co. v. Ickes*, 302 U.S. 464, 481 (1938), the court said:

"John Doe, let us suppose, is engaged in operating a grocery store. Richard Roe, desiring to open a rival and competing establishment, seeks a loan from a manufacturing concern which, under its charter, is without authority to make the loan. The loan, if made, will be *ultra vires*. The state or a stockholder of the corporation, perhaps a creditor in some circumstances, may, upon that ground, enjoin the loan. But may it be enjoined at the suit of John Doe, a stranger to the corporation, because the lawful use of the money will prove injurious to him and this result is foreseen and expected both by the lender and the borrower, Richard Roe? Certainly not, unless we are prepared to lay down the general rule that A, who will suffer damage from the lawful act of B, and who plainly will have no case against B, may nevertheless invoke judicial aid to restrain a third party, acting without authority, from furnishing means which will enable B to do what the law permits him to do. Such a rule would be opposed to sound reason, as we have already tried to show, and cannot be accepted."

[5] "The appellants further argue that . . . they may, by suit, challenge the constitutionality of the statutory grant of power the exercise of which results in competition. This is but to say that if the commodity used by a competitor was not lawfully obtained by it the corporation with which it competes may render it liable in damages or enjoin it from further competition because of the illegal derivation of that which it sells. If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is *ultra vires*, that there is a defect in the grant of powers to it, or that the *means of competition* were acquired by some violation of the Constitution. The contention is foreclosed by prior decisions that the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, and will not support a cause of action or a right to sue." *Tennessee Power Co. v. T.V.A.*, 306 U.S. 118, 139-40 (1939).

above reasoning applies where the competitor is the United States Government, i.e., in the public power field or more frequently where the government has enhanced competition by financial aid or grants to a competitor, even though the government may not have followed to the letter all of the requirements, or may have exceeded the restrictions and proscriptions of the Act of Congress creating or permitting its action.[6]

A further reason sometimes assigned for denying standing is that to allow such would permit some citizen or taxpayer who claimed a "public interest" or who desired to act as a "private attorney general" to challenge in court every action of the government.

Less than a year ago the Court of Appeals for the Eighth Circuit in a lengthy opinion adopted the rationale of the above cited cases. *Rural Electrification Admin. v. Northern States Power Co.*, 373 F.2d 686 (8th Cir. 1967), *cert. denied* 387 U.S. 945 (1967), ... S.Ct. ....., ... L.Ed.2d ..... This decision binds this court and thus requires a dismissal of plaintiffs' complaint.

Of the several cases relied on by plaintiffs, most of them are distinguishable and not applicable to the case at bar. Several relate to situations where the federal or state governments have recognized that a particular field of competition is subject to regulation and restriction as to the number who may engage in such business, i.e., where for the benefit of the public, totally free and unrestrained competition in the bank-

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6 ". . . When Congress has not given them any such standing by express or implied provision of statute * * *, mere economic competition made possible by governmental action (even if allegedly illegal) does not give standing to sue in the courts to restrain such action. . . . For purposes of standing in this case, the sufficiency of appellants' allegations of 'legal wrong' thus depend upon congressional intent to bestow upon them a legal right to protection from such competition." *Pennsylvania Railroad Co. v. Dillon*, 335 F.2d 292, 294-95 (D.C. Cir. 1964).

ing field, for instance, is not desirable and should be confined. So, when a plaintiff already has a license or franchise to engage in such a field of business, the prospective entry of another into the same field has been held to give plaintiff standing to demand judicial review. Accordingly standing has been allowed to challenge the Comptroller's action in chartering a new national bank or a new branch of a national bank. *National Bank of Detroit v. Wayne Oakland Bank*, 252 F.2d 537 (6th Cir. 1958); *Hoosier State Bank of Indiana v. Saxon*, 248 F. Supp. 233 (N.D. Ind. 1965); *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963); *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8th Cir. 1966). In these cases an existing bank was the challenger in a field where, for the benefit of the public, the number who are allowed in competition is limited. A grocery store or data processing company failure or bankruptcy would be unfortunate and cause the proprietors and owners to lose their investment, but a bank failure would cause not only loss of the owner's investment but also loss to many unwary members of the public who are depositors. For this reason competition is limited as to the number who can engage in this business. Thus in the interest of the public one already in this field has standing to challenge a proposed new entrant.

In accordance with this same general philosophy is *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470, 60 S.Ct. 693, 83 L.Ed. 869 (1940), allowing a competing radio station standing in the public interest to challenge an order granting a certificate to a new station.

The case of *Georgia Ass'n of Ind. Ins. Agents, Inc. v. Saxon*, 260 F. Supp. 802 (N.D. Ga. 1966), involved a section of the National Bank Act (12 U.S.C. §92) permitting the sale of insurance by national banks located in towns of 5,000 population or less. Insurance agents were allowed standing

judicially to question the Comptroller's ruling granting certain authority to write insurance by national banks in cities of any size, on the grounds that this statute by clear implication was intended to protect a class, i.e., certain insurance agents and representatives. Thus standing existed in any member of this class. There is no such statute protecting data processors.

In this same category is *Investment Company Institute v. Camp*, 274 F. Supp. 624 (D.D.C. 1967), where a national bank instituted a collective investment fund. Plaintiff association sought to restrain the Comptroller from authorizing such. Plaintiff was held to have standing in view of the specific wording of the National Bank Act which by its language segregated generally national commercial banking from the securities business, thus creating a protected class. Cf., *National Ass'n of Securities Dealers, Inc. v. Securities Exchange Commission* (Case #20,164, D.C. Cir. decided November 21, 1967), denying standing involving the same bank in a somewhat differing controversy.

As to *Baker, Watts & Co. v. Saxon*, 261 F. Supp. 247 (D.D.C. 1966), it can only be said that it seems contrary in its philosophy and holding to the Eighth Circuit holding in *Rural Electrification Admin. v. Northern States Power Co.*, 373 F.2d 686 (8th Cir. 1967), *cert. denied* 387 U.S. 945 (1967), ... S.Ct. ....., ... L.Ed.2d ..... Perhaps the same can be said of some of plaintiffs' other cases. Even those distinguished hereinabove fundamentally adopt or lean toward the *Baker, Watts, supra*, approach and rationale. *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8th Cir. 1966), as an Eighth Circuit case, predates *Rural Electrification Admin. v. Northern States Power Co., supra*, by slightly more than a year and though it has language which would seem to support plaintiffs' contentions, it was distinguished by the court itself in the *Rural Electrification Admin. v. Northern*

States Power Co. case and classified as illustrative of the type of case where an existing licensee in a regulated competitive field has standing where it offers to prove detriment to the public interest by the potential entrance of a new competitor.

Certain other cases are difficult to reconcile. As stated in *Rural Electrification Admin. v. Northern States Power Co.*, 373 F.2d 686, 692 (8th Cir. 1967):

> "Although concepts of standing, judicial reviewability and justiciable controversy are intermingled in the area of administrative review, our analyses compels reversal under any or all of these jurisdictional bases. Appellees' brief well demonstrates isolated statements and cases dealing with agency review are not all simply reconciled. . . ."

There is the view relied on by plaintiffs that actions of government officials ought to be rather freely judicially reviewable; that public officials ought to be subject to some rein by the court.[7] Davis in his textbook on ADMINISTRATIVE LAW, Chapter 22, and specifically §22.18 takes particular issue with the federal cases denying standing and sets forth in the Chapter numerous reasons therefor.

Apart from all of the above, the rule in this Circuit seems clear from the teachings of *Rural Electrification Admin. v. Northern States Power Co., supra.* Such binds this court.

A separate order granting defendants' motions to dismiss plaintiffs' complaint has been entered.

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[7]In *Whitney Nat'l Bank v. Bank of New Orleans*, 379 U.S. 411, 427, 85 S.Ct. 551, 13 L.Ed.2d 286 (1965), the dissenting justice (quoted in *Webster Groves Trust Co. v. Saxon, supra*) stated:

> ". . . absent a congressional design to bar all judicial review . . . injunctive relief is available where administrative remedies are either inapplicable or inadequate. This rule keeps the Comptroller from being a free-wheeling agency dispensing federal favors; and it gives some assurance that he will render principled decisions within the rule of law laid down by Congress."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,218

Association of Data Processing Service Organizations, Inc., and Data Systems, Inc.,

Appellants,

vs.

William B. Camp, Comptroller of the Currency of the United States, and American National Bank and Trust Company,

Appellees.

Appeal from the United States District Court for the District of Minnesota.

[February 6, 1969.]

Before VOGEL, LAY and BRIGHT, Circuit Judges.

LAY, Circuit Judge.

Plaintiffs appeal from an order dismissing their complaint against the Comptroller of the Currency of the United States and the Minnesota domiciled American National Bank and Trust Company. One of the plaintiffs is Association of Data Processing Service Organizations, an incorporated association of data service organizations domiciled in Pennsylvania whose members perform data processing services throughout

the United States. It is hereinafter referred to as ADAPSO. The other plaintiff, Data Systems, Inc., is a Minnesota corporation engaged in the data processing business, with its principal place of business in Minneapolis. The complaint seeks equitable relief against the defendants and a "determination of the powers granted national banking associations under [the National Bank] Act as set forth in 12 U.S. Code §24." It is alleged that by administrative rule that Comptroller of the Currency has authorized national banks to perform data processing services for bank customers in violation of 12 U.S.C. §24 which gives national banks only "incidental powers as shall be necessary to carry on the business of banking." Plaintiffs allege that as a result of the unauthorized action ADAPSO members are threatened with the loss of a substantial part of the data processing market.[1] It is alleged that American National now performs data processing services for two companies with whom Data Systems had "negotiated" as prospective customers.

Jurisdiction is asserted by reason of an alleged federal question arising under the banking laws of the United States. 12 U.S.C. §§ 21 et seq. The trial court dismissed plaintiffs' complaint for lack of jurisdictional standing. We affirm.

The question of standing serves as a test of federal jurisdiction. Standing is the constitutional prerequisite related to whether a justiciable "case or controversy" exists. Involved is an examination to determine whether the plaintiffs have a personal stake legally sufficient "to assure that concrete adverseness" which avoids merely abstract determinations. *Flast v. Cohen,* 392 U.S. 83 (1968). See also *Aetna*

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[1]We need not decide whether ADAPSO as an association can properly allege "loss of competition" on behalf of its members when it is not engaged in the data processing business itself. See discussion, Jaffe, Judicial Control of Administrative Action 542-43 (1965).

Life Ins. Co. v. Haworth, 300 U.S. 227 (1937). Justiciability, although not always related to standing, becomes definitely attached when we consider whether the legal relationships of parties are such that they are aligned with adverse legal interests.

Plaintiffs assert standing in that they have been and will continue to be economically injured by *illegal* competition of the national banks. Whether a litigant has standing to challenge competitive injury has been the subject of extended litigation and discussion. Doctrinal rules have developed a maze of conceptualistic abstractions and theories which at times are viewed and applied as being indistinguishable one from another. See *Baker, Watts & Co. v. Saxon*, 261 F.Supp. 247 (D.D.C. 1966), aff'd sub nom., *Port of N. Y. Authority v. Baker, Watts & Co.*, 392 F.2d 497 (D.C. Cir. 1968); *Saxon v. Georgia Ass'n of Ind. Ins. Agents, Inc.*, 399 F.2d 1010, 1019 (5 Cir. 1968) (concurring opinion).[2]

The trial court here has observed that language in *Rural Elec. Admin. v. Northern States Power Co.*, 373 F.2d 686 (8 Cir. 1967) (denying standing)[3] and in *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8 Cir. 1966) (allowing standing)[4] seems to state divergent principles, either of which could govern in the instant case. However, all legal

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[2]See also extended discussion in 3 Davis, Administrative Law 208-294 (1958); Jaffe, Judicial Control of Administrative Action 500-531 (1965). And more recently, Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601 (1968).

[3]We stated in *Northern States*, 373 F.2d 692:

"Appellees readily recognize that the interest of the economic competitor is not sufficient standing to challenge the authority or discretion of the Administrator to make loans."

[4]We stated in *Webster Groves*, 370 F.2d 388:

"[W]hen a competitor believes he is being subjected to illegal competition owing to impropriety by the Comptroller, the courts should be open to hear and decide the alleged wrong."

principles must be qualitatively analyzed within the context of factual surroundings. Much of the confusion on standing seems to arise from the emphasis upon the issues to be adjudicated or upon the possible merits of the substantive claim rather than upon an examination of the *status* of the complaining plaintiff. Whether or not a defendant is alleged to be engaged in illegal competition cannot by itself determine a plaintiff's standing to complain. Cf. *Chicago v. Atchison, T. & S. F. Ry.*, 357 U.S. 77 (1958) and note 8 infra. Chief Justice Warren has stated, "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." However, he added, ". . . it is both appropriate and necessary to look to the substantive issues for another purpose, namely, to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99, 102 (1968).

Whether a party may or may not challenge alledgedly illegal competition by others is best evaluated by examining the various factual circumstances within which the courts have discussed a particular plaintiff's standing and competitive injury.

Perhaps most well known are the so-called "power cases," where the threatened economic loss arises from government-created competition. In these situations the embryo of the competition by the defendant is generally found in congressional legislation. But even though the validity of such legislation is challenged, or an attack is made on the authority of a government agent to loan money, the courts uniformly have denied standing to competitors who otherwise possess

no legal right to be free from competition.[5] This group of cases is represented by *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 137 (1939), which early emphasized:

> "The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. The principle is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."

See also *Rural Elec. Admin. v. Northern States Power Co.*, supra.

Secondly, in contrast to the "power" cases are situations where a plaintiff, possessing a public grant or contract to operate, seeks to prevent a competitor from entering into an area of regulated and *restricted* competition. Representative of these cases is *Frost v. Corporation Comm'n*, 278 U.S. 515 (1929). This court has applied the rationale of *Frost* to a suit by a state bank against the Comptroller to prevent illegal competition. *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8 Cir. 1966). As observed in *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 323 F.2d 290 (D.C. Cir. 1963), rev'd on other grounds, 379 U.S. 411 (1965), involved is a property right arising out of a public charter which bestows a *legal* interest on a state bank to complain.[6]

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[5]In addition, even though the attack upon a government program to loan money is alleged to be illegal, this does not make the competition itself legally wrong. This is explained because "the borrower owes him [the plaintiff] *no obligation* to refrain from using the proceeds in any lawful way the borrower may choose." *Alabama Power Co. v. Ickes*, 302 U.S. 464, 480 (1938). (Emphasis ours.)

[6]The branch banking provisions of the National Bank Act make the establishment of branch banks subject to the law of the states. 12 U.S.C. §36. A primary purpose in doing so is to ensure competitive equality between state

Closely related but significantly different are those cases involving areas of competition which because of public interest find need of public licensing as opposed to a public grant or contract.[7] Here plaintiff-competitors are considered to be without a private "legal right" to protest unauthorized competition but nevertheless find standing by specific legislation as "aggrieved persons" to act in the public interest.

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and national banks. *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966). It has accordingly been held that this provision gives state banks a sufficient legal interest to provide them with statutory standing to challenge the legality of branching by national banks. See *National Bank v. Wayne Oakland Bank*, 252 F.2d 537 (6 Cir. 1958), discussed in *Hoosier State Bank v. Saxon*, 248 F.Supp. 233 (N.D. Ind. 1965). The contrast between basing a state bank's standing on a "property right" arising out of its charter and standing by reason of its inclusion within the class intended to be protected by the National Bank Act is one without essential difference. Perhaps the most realistic approach is that the right indigenous to the charter is protected by the statute.

[7]The Court stated in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 at 474 (1940):

> "In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.
>
> "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured the Act contemplates inquiry by the Commission, *inter alia*, into an applicant's financial qualifications to operate the proposed station.
>
> "But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel."

See, e.g., *FCC v. Sanders Bros. Radio* ... *Station*, 309 U.S. 470 (1940); *Scripps-Howard Radio, Inc.* ... *v. FCC*, 316 U.S. 4 (1942). Cf. *Office of Communication* ... *of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). In these cases *Congress* has patently recognized nee... even though the competitive business ... ered free and otherwise unrestricted.[8]

Fourth, there are situations where ... ed for judicial review standing to challenge competition whi... s controlled is considlation of a statute, where the statute ... competitors are given acted for the express protection of t... which is allegedly in vio- complaining. The most recent exam... itself is said to be en- found in *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968).[9] the class of competitor ... mple of these cases is

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[8] But cf. *Chicago v. Atchison, T. & S. F. Ry.*, 357 U.S. 77 (1958). The Supreme Court recognized standing of a municipal ... al licensed public transportation system to intervene and attack the entry of one ... e seeking to compete in an alleged violation of a city ordinance. The Court ... rt made clear that standing of the intervenor could not be viewed from exa... examination of the merits as to whether in fact the competition was or was not ... hot illegal. Parmelee, the intervenor, for many years had enjoyed an arrangem... ment with the railroad to transport passengers between stations. Parmelee w... was notified of its termination. A competitor, Railroad Transfer Service, was su... subsequently given this business notwithstanding a city ordinance that prohibite... ited it from doing so without a license from the city. The Court found that Pa... Parmelee had "a direct and substantial personal interest in the outcome" and ... nd allowed standing. The ordinance was then held unconstitutional as being ... ing repugnant to the Interstate Commerce Act and the intervenor lost.

This case may best be categorized with th... those instances where standing to challenge illegal competition is implicitly fou... found within a legislative enactment, be it an existing ordinance or statute, va... valid or not. Cf. *Alton R.R. v. United States*, 315 U.S. 15, 19 (1942).

[9] The Supreme Court said:

> "This Court has, it is true, repeatedly held t... d that the economic injury which results from lawful competition cannot, in ... legality of any aspect of its com- on the injured business to question the lega... petitor's operations. *Railroad Co. v. Elle... llerman*, 105 U.S. 166 (1882); *Alabama Power Co. v. Ickes*, 302 U.S. 464 ... 64 (1938); *Tennessee Power Co. v. TVA*, 306 U.S. 118 (1939); *Perkins v. L... v. Lukens Steel Co.*, 310 U.S. 113 (1940). But competitive injury provided ... led no basis for standing in the above cases simply because the statutory ... y and constitutional requirements that the plaintiff sought to enforce were i... e in no way concerned with protecting against competitive injury. In con... contrast, it has been the rule, at

Plaintiffs' reliance on recent cases against the Comptroller fall within facile classification of this rule. See, e.g., *Baker, Watts & Co. v. Saxon,* 261 F. Supp. 247, supra, as explained in *Investment Co. Institute v. Camp,* 274 F. Supp. 624, 636 (D.D.C. 1967); *Saxon v. Georgia Ass'n of Ind. Ins. Agents, Inc.,* 399 F.2d 1010 (5 Cir. 1968).[10]

Fifth, the last group of "competition" cases relates to a plaintiff's unsuccessful challenge of a competitor's alleged *ultra vires* acts affecting plaintiff's non-regulated area of commerce. This factual setting is best illustrated by *Railroad Co. v. Ellerman,* 105 U.S. 166 (1882). In that case the plaintiff, who had contracted with the city of New Orleans to collect revenue from users of the city wharves, sought to enjoin a railroad company from operating wharves in New Orleans. He alleged this action would constitute illegal competition because the state statute authorizing the company to operate wharves was unconstitutional. The principle here furnishes an analogue to that in the "power cases" where the conduct of the defendant, although alleged to be illegal is nevertheless considered "lawful" with respect to

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least since the *Chicago Junction Case,* 264 U.S. 258 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision. See *Alton R. Co. v. United States,* 315 U.S. 15, 19 (1942); *Chicago v. Atchison, T. & S. F. R. Co.,* 357 U.S. 77, 83 (1958).

"Petitioners concede, as of course they must, that one of the primary purposes of the area limitations in §15d of the Act was to protect private utilities from TVA competition." *Hardin v. Kentucky Util. Co.,* 390 U.S. at 5-6.

[10]We do not share confidence in the alternative holding in *Saxon v. Georgia Ass'n of Ind. Ins. Agents, Inc.,* 399 F.2d 1010 (5 Cir. 1968), that outside the "statutory aid to standing" plaintiffs had "a legal right to protect themselves from unlawful competition." Id. at 1018. The emphasis that plaintiff's standing arises out of the allegation of "unlawful competition" as contrasted to "lawful competition" seemingly relates standing to the merits of the claim to be adjudicated rather than the status of a party to complain. For a similar critique, see Judge Thornberry's concurring opinion, 399 F.2d at 1020, n. 3.

the plaintiff because of the total absence of legal interest found in plaintiff's status.[11]

In summary, a plaintiff may challenge alleged illegal competition when as complainant it pursues (1) a legal interest by reason of public charter or contract, *Frost v. Corporation Comm'n*, supra, (2) a legal interest by reason of statutory protection, *Baker, Watts & Co. v. Saxon*, supra, or (3)

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[11]This is explained by Mr. Justice Matthews in *Railroad Co. v. Ellerman*, 105 U.S. at 173-174:

"The sole remaining question, then, is whether Ellerman, as assignee of the city, has any legal interest which entitled him to enjoin the company from using its wharf as a public wharf beyond the limits of such use, as defined by that construction of the joint resolution. If he has such interest, it can only consist in preventing competition with himself as a wharfinger, which such more extensive use of the railroad property would create. And if the right to assert it exists, it must rest, not upon the claim that the premises are thus used for purposes to which they might not be lawfully devoted if owned and used by a natural person, but on the allegation merely that such use is beyond the corporate powers of the company. But if the competition in itself, however injurious, is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting *ultra vires*? The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for any one to compete with the company, although the latter may not be authorized to engage in the same business. *The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty.* A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in preventing the usurpation and perversion of its franchises, because it is a trustee of its powers for uses strictly public. In these questions the appellee has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed." (Emphasis ours.)

a "public interest" in which Congress has recognized the need for review of administrative action and plaintiff is significantly involved to have standing to represent the public, *FCC v. Sanders Bros. Radio Station,* supra. From this analysis, it seems clear that an allegation of "illegal competition" is not the balancing determinant of a plaintiff's standing. The primary search must rest on whether the plaintiff's status is one which enjoys a private interest entitled to protection or is one which the law recognizes to be of such legal significance to allow a party to act as a public representative for a public interest.

In the instant case the facts clearly place plaintiffs outside those cases which recognize standing. Plaintiffs are competing in a non-regulatory field of free competition. They possess no private legal interest nor do they plead any legal harm which is recognized at law. Their status is not one which places them within a class designedly protected by statute.[12] In direct accord see *Wingate Corp. v. Industrial Nat'l Bank,* 288 F.Supp. 49 (D.R.I. 1968); *Arnold Tours, Inc. v. Camp,* 286 F. Supp. 770 (D. Mass. 1968).

Plaintiffs' argument is in essence an equitable plea, that in effect they have a personal stake to pursue, even though not a legal one, but nevertheless one which makes them logical parties to protect the public interest from illegal actions of government agencies.

The problem with their plea is many-fold. Congress has not seen fit within the National Bank Act to recognize any

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[12]The Bank Act has never been construed to give a private litigant standing to complain concerning *ultra vires* acts of national banks relating to executed contracts. See *National Bank v. Matthews,* 98 U.S. 621 (1878). Although distinctive policy arguments exist for this rule, nevertheless there exists no legislative history nor do plaintiffs offer any serious contention that the National Bank Act was intended to give these private litigants standing to litigate alleged *ultra vires* activities of national banks. The reliance on the Bank Holding Company Act of 1966 and the Bank Service Corporation Act is misplaced. Neither act is applicable here.

"aggrieved person" to assert the public's rights. Congress has not expressed a public concern for protection as found in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), and its progenitors. Without a legal interest or the status of a recognized "aggrieved" party, the complaint resolves itself into an attempt merely to show "a common concern for obedience to law." *L. Singer & Sons v. Union Pac. R.R.*, 311 U.S. 295, 304 (1940). As pronounced in *Singer*, outside statutory consent, the general or common interest can find protection only in the standing granted to public authorities. Unless a relevant statute provides for a "party in interest" to seek judicial review or unless a complainant possesses a recognized legal interest, he lacks standing to be a "private attorney general" to represent the public interest. See *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir. 1955); *Braude v. Wirtz*, 350 F.2d 702, 707, 708 (9 Cir. 1965).[13]

Mr. Justice Frankfurter best describes judicial obligation to avoid review when legal standing is not otherwise involved:

> "The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a 'case or controversy.' The scope and consequences of the review with which the judiciary is entrusted over executive and legislative action require us to observe these bounds fastidiously." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 150 (1951) (concurring opinion).

Judgment affirmed.

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[13]See also our prior discussions concerning the applicability of the Administrative Procedure Act in *Rural Elec. Admin. v. Northern States Power Co.*, 373 F.2d at 692, n. 9.

APPENDIX C

(Judgment)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19218. September Term, 1969

Association of Data Processing Service Organizations, Inc., and Data Systems, Inc.,

Appellants,

vs.

William B. Camp, Comptroller of the Currency of the United States, and American National Bank and Trust Company,

Appellees.

Appeal from the United States District Court for the District of Minnesota

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This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

February 6, 1969.

Costs taxed in favor of apppellee American Natl. Bank & Trust Co. for printing brief—$98.00.

Costs taxed in favor of appellee Wm. B. Camp, Comptroller, etc., for printing brief & suppl. brief & Appendix—$32.96.

APPENDIX D

5 U.S.C. §702:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

12 U.S.C. §24:

"Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

* * * * *

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. . . ."

12 U.S.C. §1864:

"No bank service corporation may engage in any activity other than the performance of bank services for banks."

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7192

ARNOLD TOURS, INC., ET AL.,
Plaintiffs-Appellants,

VS.

WILLIAM B. CAMP, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
For the District of Massachusetts

---

and

No. 7186

THE WINGATE CORPORATION,
Plaintiff-Appellant,

VS.

INDUSTRIAL NATIONAL BANK, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
For the District of Rhode Island

Before ALDRICH, *Chief Judge,*
WOODBURY,* *Senior Circuit Judge,* and
COFFIN, *Circuit Judge.*

March 27, 1969.

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*Sitting by designation.

ALDRICH, *Chief Judge.* These are two actions by parties engaged in certain business pursuits to restrain competition from national banks which, supported by rulings of the Comptroller of the Currency, have entered their fields. Plaintiffs seek, basically, to attack these rulings. In both cases the district courts held that they were without standing to do so, and dismissed the complaints on motions of the defendants. Plaintiffs appeal.

THE TRAVEL AGENCY BUSINESS

We consider first the action brought by Arnold Tours, Inc. and some forty other independent travel agencies in Massachusetts, allegedly on behalf of others similarly situated as well as themselves, against the Comptroller and the South Shore National Bank. The bank, in reliance upon a ruling by defendant Comptroller's predecessor,[1] is engaging not merely in the financial aspects of travel, but "full" travel service, or a complete travel agency business. To quote from what is said to be the bank's own announcement, its employees are prepared to arrange for bicycles in Bermuda, villas on the Riviera, and houseboats in Kashmir. The Comptroller argues at length that this is traditional and legitimate bank activity. We do not, however, consider this matter except to say that plaintiffs present enough of an issue so that the question of standing is properly before us. We also note that no question of reviewability of the Comptroller's rulings has been raised. *See generally,* Saferstein, Nonreviewability: A Functional Analysis of "Committed to

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1 "¶7475. National banks acting as travel agents.

Incident to those powers vested in them under 12 U.S.C. 24, national banks may provide travel services for their customers and receive compensation therefor. Such services may include the sale of trip insurance and the rental of automobiles as agent for a local rental service. In connection therewith, national banks may advertise, develop, and extend such travel services for the purpose of attracting customers to the bank. See ¶7376."

Agency Discretion," 82 Harv. L. Rev. 367, 383 & n. 60 (1968). Our sole question is the correctness of defendants' contention, which we will paraphrase as saying that what the bank chooses to do is, both literally and figuratively, none of plaintiffs' business.

It has long been settled that an ordinary competitor has no standing to complain of a party's lack of legal authority to engage in his business, in a suit against the competitor, the government, or both. *Railroad Co. v. Ellerman,* 1881, 105 U.S. 166; *Alabama Power Co. v. Ickes,* 1938, 302 U.S. 464; *Tennessee Power Co. v. TVA,* 1939, 306 U.S. 118. Despite numerous exceptions, this principle has withstood erosion not only because of the traditional rationale behind standing doctrines generally, *see Flast v. Cohen,* 1968, 392 U.S. 83, 91-101, but because of the policy encouraging free and open competition—a policy that favors competition in the market place, not in the courts. The exceptions, where standing is recognized, are as well established as the principle itself. The first is for complaints of "illegal" competition, by which is usually meant competition that is unlawful as to plaintiff apart from considerations of corporate power or authority. *See Alabama Power Co. v. Ickes, supra* at 479; *Central Louisiana Elec. Co. v. REA,* W.D. La., 1964, 236 F.Supp. 271, 277, *rev'd,* 5 Cir., 354 F.2d 859, *cert. denied* 385 U.S. 815; *but cf. Kansas City Power & Light Co. v. McKay,* D.C. Cir., 1955, 225 F.2d 924, *cert. denied* 350 U.S. 884. Plaintiffs do not suggest that the Comptroller has sanctioned, or that the bank has undertaken, any unfair, conspiratorial, or criminal methods of competition, or that there has been any violation of the antitrust laws. The second exception is where it is claimed that some "legal right" has been injured, by which is meant, in its nonconclusory sense, that plaintiff has an independent property right, or a right to be free from the particular kind of competition he is challenging. Such a

right is attached to or arises out of an exclusive franchise, on the one hand, or a restricted license or the like, on the other. *Frost v. Corporation Commission*, 1929, 278 U.S. 515; *cf. Whitney National Bank v. Bank of New Orleans*, D.C. Cir., 1963, 323 F.2d 290, 299-300, *rev'd on other grounds*, 379 U.S. 411. Plaintiffs fit in no such category.

The final general exception is where the plaintiff can show the existence of a "statutory aid to standing" for a class of persons which includes himself. This statutory aid may take the form of a "judicial review" provision of the particular administrator in question for "parties aggrieved," "adversely affected," or the like. In such a case, *FCC v. Sanders Bros. Radio Station*, 1940, 309 U.S. 470, would presumably provide standing for legitimate competitors. *See generally, Jaffe, Judicial Control of Administrative Actions*, 513-31. There is, however, no such provision as to the Comptroller of the Currency. An alternative statutory aid may be found if there is an indication of Congressional intent, explicit or implicit, in the relevant substantive acts to grant protection to the competitive interests of a class of businesses which includes the plaintiff. Thus in *Hardin v. Kentucky Utilities Co.*, 1968, 390 U.S. 1, the Supreme Court found that a competing private utility company had standing to challenge the expansion of TVA into new areas in alleged violation of the area limitations of section 15d(a) of the Tennessee Valley Authority Act, 16 U.S.C. §831n-4 (a). The Court said, "[O]ne of the primary purposes of the area limitations in §15d of the Act was to protect private utilities from TVA competition. . . . Since respondent is thus in the class which §15d is designed to protect, it has standing . . . ." 390 U.S. at 6-7.

The only possible statutory aid to the standing of travel agents in national banking legislation exists in 12 U.S.C. §24(7). This section states that national banks may "exer-

cise . . . all such incidental powers as shall be necessary to carry on the business of banking," and then lists numerous powers explicitly granted. It has long been settled in suits over private contracts that the enumeration of such powers is an effective and strong prohibition of all activities not enumerated and not incidental to banking. *See First National Bank v. National Exchange Bank,* 1875, 92 U.S. 122, 128; *National Bank v. Matthews,* 1878, 98 U.S. 621, 625; *Logan County National Bank v. Townsend,* 1891, 139 U.S. 67, 73. But even assuming that national banks are prohibited by section 24(7) from entering into the business of procuring travel arrangements, this is not sufficient to provide a statutory aid to standing. The prohibition must be demonstrably intended to protect the competitive interests of other members of the prohibited business. *See* the concurring opinion of Judge Thornberry in *Saxon v. Georgia Ass'n of Independent Ins. Agents,* 1968, 5 Cir., 399 F.2d 1010, 1019; *Association of Data Processing Serv. Organizations v. Camp,* D. Minn., 1968, 279 F.Supp. 675, *aff'd,* 8 Cir. 2/6/69, ... F.2d ..... We, too, (see 8th Cir. opinion in *Camp,* n. 10), cannot accept the simplistic suggestion by the majority in *Georgia Ass'n,* 399 F.2d at 1016, that as soon as it appears that the competitive activities were unlawfully carried out the plaintiffs have standing.

The plaintiffs have not pointed to, nor have we in our research discovered, any evidence that Congress in delimiting the scope of banking activity in the ultra vires section, quoted *supra,* was concerned, in 1863 and 1864 when the national banks were formed,[2] with competitors in the businesses impliedly prohibited, much less in any particularity with travel agents (if they then existed). Rather, the limita-

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[2]National Bank Act of 1863, ch. 58, 12 Stat. 665; National Bank Act of 1864, ch. 106, 13 Stat. 99.

tions were for the purpose of insuring the stability, liquidity, and safety of the banks. *See National Bank v. Matthews, supra* at 626; Davis, Banking Regulation Today: A Banker's View, 31 Law & Contemp. Problems 639 (1966). *See also* Million, The Debate of the National Bank Act of 1863, 2 J. of Pol. Econ. 251 (1894). No doubt Congress has continuously, from 1864 to the present, been "very careful" (see *infra*) in restricting the activities of banks; and no doubt Congress has been, as we shall see in the second portion of this opinion, specifically concerned with certain potential competitors of the banks. But as Senator Proxmire pointed out while offering an amendment to banking legislation[3] specifically designed to protect particular competitors, the thrust of the close regulation of banks is for purposes of stability: "We are very careful in the regulations of banks. This has principally been done to assure the solvency of the banks by limiting the activities of banks to safe and relatively liquid investments." 108 Cong. Rec. 22031 (1962). *See also* S.Rep. No. 2105, 87th Cong., 2d Sess. (1962) (Supplemental views of Senators Proxmire, Douglas, and Neuberger) in 2 U.S. Code Cong. & Admin. News, 1962, at 3887. While at some point Congressional concern with a sufficient quantity of specific competitors of banks might indicate a Congressional intent that section 24(7) should now be read as a measure not only to protect investors but also to protect all potential members of prohibited activities, such a point has not been reached. More proof of Congressional solicitude is required before this court or any court should convert an economic struggle into a legal one.

The plaintiffs have suggested, however, that the general rule denying competitors standing is no longer valid, or

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[3]This legislation will form the basis of our holding in the second half of this opinion.

has undergone substantial change. First, they argue that section 10(a) of the Administrative Procedure Act, 5 U.S.C. §702 provides standing for any persons claiming to be "adversely affected in fact." This contention seems derived from the interpretation of section 10(a) urged by Professor Davis in his Administrative Law Treatise, §22.02, and presumably adopted in *American President Lines v. FMB*, D.D.C., 1953, 112 F.Supp. 346.[4] We, however, choose to side with Professor Jaffe[5] and the majority of the Courts[6] in holding that the passage of the APA was not intended to alter to such a drastic extent previous law on the question of standing. Moreover, we should add that we have serious reservations whether a test of "adversely affected in fact" would provide a simpler means of deciding the issue of standing. We do not pause for such analysis in the present case, but if, as has been suggested, simplicity and ease of determination is a reason for preferring the new interpretation, we do not find it.[7]

The plaintiffs alternatively urge that *Flast v. Cohen*, *supra*, indicates a major shift in the judicial attitude toward the general doctrine of standing; and that while it is not directly in point, this decision indicates that the relevant test for determining standing in this situation is whether

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[4]*See also Baker, Watts & Co. v. Saxon*, D.D.C., 1966, 261 F.Supp. 247.

[5]Jaffe, Judicial Control of Administrative Action 528-30. *See also* Note, Competitors' Standing to Challenge Administrative Action Under the APA, 104 U.Pa.L.Rev. 843 (1956).

[6]*See Saxon v. Georgia Ass'n of Independent Ins. Agents*, *supra*, at 1019, n. 1; *REA v. Northern States Power Co.*, 8 Cir., 1967, 373 F.2d 686, 692-93, and nn. 9-10, cert. denied 387 U.S. 945; *Kansas City Power & Light Co. v. McKay*, *supra*.

[7]Indeed, one of the bases for the rule against competitors' suits might well be the difficulty of determining whether mere increased competition is an injury in fact, particularly where a new and largely undeveloped market is involved. Cf. *World Airways, Inc. v. Northeast Airlines, Inc.*, 1 Cir., 1966, 358 F.2d 691.

the parties are sufficiently adverse to bring into focus the issues raised. *See also* the concurrence of Judge Thornberry in *Saxon v. Georgia Ass'n of Independent Ins. Agents, supra.* Our first response to plaintiffs' contention is that *Flast v. Cohen* was not intended to have any major reshaping effect outside the area of standing determinations under Article III for taxpayer suits challenging the constitutionality of a federal taxing and spending statute. Such an approach to standing as used in *Flast*—one focusing solely upon an assessment of the degree of adversity and clarity of the particular case—if applied to questions of administrative law standing would disturb the entire judicial relationship to the administrative as presently understood by Congress. Congress now knows that if it wishes a particular class of plaintiffs to have, or not to have, standing to seek review of agency rulings, it may make, or not make, the types of legislative provisions discussed earlier in this opinion, and that is an end to the matter. Under plaintiffs' proffered approach, the courts would have the last word on standing, based upon their view of the justiciability of the particular circumstances pleaded. When the conflict is one of constitutional dimensions, such an approach may be necessary. In purely administrative matters we think otherwise.

Our second answer is that even if we were to assume that *Flast v. Cohen* was intended to affect other areas, we do not read that case to require all administrative standing determinations to be made solely upon an assessment of the degree of adversity and clarity. Rather, *Flast* was concerned with reevaluating the standards for determining adversity and clarity in a situation where the relevant standing doctrine was adjudged to rest entirely upon such considerations. *Flast* is inapplicable when the standing doctrine in question rests upon a basis largely independent of the con-

cerns for adversity and clarity—namely, the limited role of the judiciary in regulating legitimate competition.

In sum, we find no acceptable basis for standing for the travel agents.

Data Processing

Turning to the second action involving the Comptroller, here plaintiff, Wingate Corporation, which performs certain data processing services for hire, brings suit to enjoin the defendant, Industrial National Bank of Rhode Island, from performing data processing services for the City of Providence, as sanctioned by a general ruling of the Comptroller. While Wingate, like Arnold, complains that the bank is violating section 24(7) of 12 U.S.C. by providing such services to bank customers, its claim to standing is aided by the presence of specific Congressional legislation dealing with banks and computer servicing. In 1962 Congress, after some debate, enacted the Bank Service Corporation Act, 76 Stat. 1132, which allowed small banks to combine to form a separate corporation which could own data processing equipment. The primary purpose of this legislation was to allow small banks to compete more effectively with the larger banks, which had sufficient capital and business to buy their own electric data processing equipment. However, in order to prevent such corporations being used as a subterfuge for entering into the nonbanking business of data processing, and to protect the interests of certified public accounting firms, Congress provided in section 4 of that Act, 12 U.S.C. §1864, "No bank service corporation may engage in any activity other than the performance of bank services for banks." The legislative history is clear. The prohibition originated in an amendment proposed by the National Society of Public Accountants, which objected to the original version of the bill that would have allowed bank service corporations to

solicit outside business to some extent. The Accountants feared injury to their growing business of bookkeeping with the aid of computers. The final provision was an obvious response. *See* 108 Cong. Rec. 16499, 22031 (1962); Hearings on Misc. Bank Bills Before the Comm. on Banking & Currency of the United States Senate, 87th Cong., 2d Sess., at 79-80 (1962).

We conclude that the present plaintiff is within the class of persons intended to be protected by section 4 of the 1962 legislation, and the only question is whether standing exists to complain not of competition from bank service corporations, but from national banks directly. We conclude in the affirmative. When Congress so explicitly provides protection for a particular business against competition from a regulated national entity—even though indirectly by regulating a subsidiary—standing exists at least to entertain complaints by that business concerning its competitive relationship to the national entity. Section 4 had a broader purpose than regulating only the service corporations. It was also a response to the fears, expressed by a few senators, that without such a prohibition, the bill would have enabled "banks to engage in a nonbanking activity," S.Rep. No. 2105, *supra* (Supplemental views of Senators Proxmire, Douglas, and Neuberger), and thus constitute "a serious exception to the accepted public policy which strictly limits banks to banking." (Supplemental views of Senators Muskie and Clark). We think Congress has provided the sufficient statutory aid to standing even though the competition may not be the precise kind Congress legislated against.[8]

Indeed, there is a plausible argument that the Bank Service Corporation Act, read in conjunction with 12 U.S.C.

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[8] *But cf. Association of Data Processing Serv. Organizations v. Camp*, 8 Cir., 1969, ... F.2d ...., n. 12, which stated that the reliance of similar plaintiffs upon the Act for standing was "misplaced."

§24(7), does in fact impliedly prohibit national banks from directly entering into the data processing service business. If the section four prohibition could be avoided by a small national bank, member of a group owning a service corporation, soliciting its own data processing customers to be serviced by the subsidiary via the bank, the prohibition would be largely illusory. And if a small bank could not directly solicit such customers, it would follow that the large banks, owning their own equipment, could not, or the equalizing effect of the Bank Service Corporation Act would be lost. To be considered in opposition to such an argument is the Comptroller's ruling interpreting the section,[9] and the phenomenon of the one-bank holding company, that is not covered by the Bank Holding Company Act of 1956, 12 U.S.C.§§ 1841-49, which requires only multi-bank holding companies to divest themselves of all nonbanking interests. We leave the resolution of this conflict to future determination. For the purposes of the issue of standing, we need decide only that the passage of the Bank Service Corporation Act arguably prohibits direct entry by national banks into the data processing service business.

In case No. 7192 the judgment of the District Court is affirmed.

In case No. 7186 the judgment of the District Court is vacated and the case remanded for further proceedings not inconsistent herewith.

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[9]Comptroller's Ruling ¶7399 provides in part that:

". . . such corporations may only perform bank services for banks. Bank services, however, as defined in the Act, would include any service which a bank would ordinarily perform for a customer. Accordingly, if a bank undertakes to handle the payroll accounts or the accounts receivable of a customer, a bank service corporation may perform for the bank the service necessary to enable the bank to fulfill its undertaking."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 85

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,

Petitioners,

vs.

WILLIAM B. CAMP, Comptroller of the Currency of the United States, and AMERICAN NATIONAL BANK AND TRUST COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMERICAN NATIONAL BANK AND TRUST COMPANY, RESPONDENT, IN OPPOSITION TO PETITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1246

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,

Petitioners,

vs.

WILLIAM B. CAMP, Comptroller of the Currency of the United States, and AMERICAN NATIONAL BANK AND TRUST COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMERICAN NATIONAL BANK AND TRUST COMPANY, RESPONDENT, IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

Respondent American National Bank and Trust Company believes that the Statement of the Case in the Petition contains an error. Petitioners therein state:

"* * * In fact, respondent American Bank, at the time petitioners began their action, was performing or preparing to perform such services for the Minnesota State Capitol Credit Union, with whom petitioner Data Sys-

tems had contracted to perform such services, and for Carlen Industries, Inc., with whom Data Systems had been negotiating regarding such services." (Pet., page 3)

It is our contention that the allegations of the complaint fall far short of any contract between petitioner Data Systems and Credit Union, and apparently the Eighth Circuit Court of Appeals in this case was of the same opinion (Pet. App. B, page 24) as was the District Court (Pet. App. A, page 15, footnote 3).

REASONS FOR NOT GRANTING THE WRIT

Respondent American National Bank and Trust Company takes the position that the decision below is correct. The conflict between this decision and the one obtained in the consolidated cases of *Arnold Tours, Inc., et al. v. William B. Camp, et al.*, and *The Wingate Corporation v. Industrial National Bank, et al.* (Pet. App. E, page 36), may be resolved by refusing to grant certiorari in this case and by the granting of certiorari in *The Wingate Corporation* case. The District Court in each of these conflicting cases dismissed the complaints for lack of standing, and in the instant case, the Eighth Circuit Court affirmed but in *The Wingate Corporation* case the First Circuit reversed, holding that a statutory aid to standing is found in the Bank Service Corporation Act, 76 Stat. 1132, 12 U.S.C. § 1864 (Pet. App. E, pages 44-46). In the companion case to *Wingate Corporation*, i.e., *Arnold Tours, Inc., et al. v. William B. Camp, et al.* (Pet. App. E, page 36), the First Circuit in its opinion found that the plaintiff and some 40 independent travel agencies did not have standing to question the South Shore National Bank's right to engage in a complete travel agency business.

All of these cases involve an interpretation and application of the powers granted national banking associations as set forth in 12 U.S.C. § 24 (Pet. App. D, page 35) and the effect, if any, on the question of standing of 12 U.S.C. § 1864, Subsection 4 (Pet. App. D, page 35). The language in 12 U.S.C. § 24, Section Seventh, is very similar to a section of the New York Statutes interpreted by the New York Court of Appeals in the case of *Curtis v. Leavitt*, 15 N.Y. 9, 55, 157 (1857). This case at page 55 quotes the incidental powers section of the New York law as follows:

> "Such associations shall have the power to carry on the business of banking by discounting bills & c., by receiving deposits, by buying and selling bullion, coins, and exchange, by loaning money on real and personal estate, *and by exercising such incidental powers as shall be necessary to carry on such business.*" (Emphasis added.)

The New York Court of Appeals on page 157 made this comment:

> "The implied powers exist by virtue of the grant, and sagacity can foresee what implied powers may, in the progress of time, the discovery and perfection of better methods of business, and the ever varying attitude of human relations, be required to give effect to the expressed powers. They are therefore left to implication."

The only distinction of note between the instant case and *Wingate Corporation* is that the First Circuit concluded the plaintiff was within the class of persons intended to be protected by the Bank Service Corporation Act. We therefore focus our argument on that Act. While petitioners claim the Administrative Procedure Act, 5 U.S.C. § 702, is involved, we merely wish to point out that the First Circuit rejected this

(Pet. App. E, page 42) as did the District Court in the instant case (Pet. App. A, page 16), and that petitioners did not argue its application before the Eighth Circuit Court of Appeals (Pet., page 10).

We suggest that the total legislative history of the Bank Service Corporation Act, including the specific language of the Act itself, considered with the legislative history of the so-called Antilottery Law, 12 U.S.C. § 339, should lead to the conclusion that the Bank Service Corporation Act did not restrict the activities of any bank but only the activities of a bank service corporation which, under 12 U.S.C. § 1861(c) and § 1862(a), has to be the creature of two or more banks. (App. A, p. 11). Thus, Congress in the Bank Service Corporation Act limited the activities of two or more banks in combination but is silent on the same activities of a single bank. Similarly, the Bank Holding Company Act of 1956, 12 U.S.C. § 1841 and § 1842 (App. A, page 11), requires only multi-bank holding companies to divest themselves of all non-banking interests. Thus, a single bank holding company might engage in providing data processing services directly or through a subsidiary corporation. We urge that inasmuch as the respondent Bank here is not a bank service corporation, the Bank Service Corporation Act should have no bearing on the issue of standing.

It was a well-known fact that at the time of the hearings on H.R. 8874 (which as amended later became law and is known as the Bank Service Corporation Act), that banks were doing data processing for other banks and business concerns. The opening statement of Chairman Martin of the Federal Reserve Board at the House hearing in July 1962 bears this out:

"Next, I will offer some observations and suggestions concerning the bill H.R. 8874, which would authorize member banks of the Federal Reserve System to invest in 'bank service corporations'. * * *

"The bank service corporations established under the bill would serve as a means whereby banks—and especially small and medium-size banks—and their customers could benefit from the improved efficiency and economies possible today only through automation. * * *

"Notwithstanding the high initial cost of equipment of this kind, some banks—especially the larger banks—are purchasing or leasing this equipment. Other banks are gaining access to this equipment through various contractual arrangements with data processing centers operated by private commercial concerns, and some banks that have purchased or leased this equipment are doing data processing *for other banks and business concerns.*

"Under the bill, two or more banks would be able to pool their resources through the corporate device in order to gain the benefits—for themselves and for their customers—of this expensive equipment. This approach to the problem is not now open to member banks, because they are quite limited by the Federal banking laws as to the stock or securities that they may acquire. Of course, even if this bill is enacted, State member banks will be able to invest in bank service corporations only if authorized to do so by State law, but I understand that at least six States have recently enacted laws that specifically authorize such investments by State banks." (House Hearings on H.R. 8874, 87th Congress, pages 33-34) (Emphasis added.)

Congressman Multer made it clear that the purpose of H.R. 8874 was to enable smaller banks to get access to up-to-date processing equipment and other clerical services and that it was not intended to restrict the rights or powers of banks.

> "Mr. Chairman, I would like to make clear that the bill is not intended to go outside of the very language appearing in this bill. It is not intended to interfere with any of the rights banks now have, and as they do presently, to arrange for any of these services to be performed for them by independent agencies or independent contractors. This will not interfere with any authority now vested in banks by virtue of any of the banking laws of either the State governments or the Federal Government. It merely sets up a new means by which individual banks can acquire these additional services." (108 Cong. Rec. 16500)

The language of a bill itself is clear. It does not restrict the activities of any bank but merely the activities of a bank service corporation. Section 4 of the Act reads as follows:

> "No bank service corporation may engage in any activity other than the performance of bank services for banks."

Clearly, if Congress intended to preclude banks from performing data processing services for others, it could have included a section prohibiting banks from doing so.

On at least one occasion Congress was made aware that banks were performing data processing services for customers, and this occasion was in connection with the so-called Antilottery Laws, 12 U.S.C. § 339, et seq. A bill, H.R. 10595, 90th Congress, was introduced which in its original form would have prohibited banks from performing data processing services for lotteries. The Senate made it clear that

banks were to be able to continue such services by deleting the prohibition on data processing by banks for lotteries. Thus, Senator McIntyre in a letter to Senator Proxmire, printed at page 21 of the Senate Hearings on H.R. 10595, stated in part:

> "* 1 * For example, the Sweepstakes Commission maintains a checking account in a commercial bank. It leases safe deposit facilities. *It has contracted for time on automatic data processing equipment.*
>
> "These relationships with financial institutions are clearly within the right of an agency of a State of the United States. Nevertheless, it is my belief that each of them would be prohibited by the enactment of H.R. 10595. I would hope that the Subcommittee on Financial Institutions would find it possible to amend H.R. 10595 so that State agencies would be permitted to continue making normal use of financial institutions, regardless of the particular responsibilities of those agencies." (Emphasis added.)

On November 6, 1967, about five years after the passage of the Bank Service Corporation Act, Senator Proxmire made the following statement to the Senate committee on banking in connection with the so-called Antilottery Law, H.R. 10595, 90th Congress:

> "In recommending this legislation, the committee approved amendments which permit federally insured banks and savings and loan associations, to engage in *recordkeeping activities* and to perform other custodial functions on behalf of the State lottery. Such institutions would be forbidden to sell lottery tickets directly to the public or to advertise or promote the lottery, but they could perform other services such as *recordkeeping, data processing,* as well as the acceptance of the proceeds of

the lottery ticket sales for delivery, payment, or transfer to the State. Banks would also be permitted to distribute lottery tickets to duly authorized sales agents of the State and could make payment to the winners in such lotteries. *Since these are common bank services which are already performed for other bank customers, the committee does not believe it feasible or practical to prohibit banks from performing these same services on behalf of a State lottery.* However, the direct sale of lottery tickets to the general public is not incident to the business of banking and would be prohibited by the bill." Senate Report No. 727, 90th Congress. (Emphasis added.)

Thus, it appears that Senator Proxmire understood clearly that the Bank Service Corporation Act did not prohibit banks (as distinguished from bank service corporations) from performing data processing for its customers. The original proposed Antilottery Law, H.R. 10595, had a specific provision prohibiting insured banks from performing data processing services for lotteries which incidentally would have been unnecessary as far as national banks are concerned if they were already prohibited by national banking laws from doing so. If Senator Proxmire and other legislators were not convinced that national banks had the power to do data processing services, mere deletion of this prohibition in the proposed antilottery legislation would not have given such banks any additional powers. In the light of Senator Proxmire's foregoing statement and his own particular evaluation of the amendments, it wouldn't appear that he originally intended the Bank Service Corporation Act to prohibit national banks from doing data processing for bank customers or, at the very least, he recognized that no such purpose had been accomplished.

By reason of the fact that Congress did not see fit to specifically prohibit banks, as opposed to bank service corporations, from performing data processing services for their customers and the general public at the time of the passage of the Bank Service Corporation Act, and inasmuch as it went out of its way to be sure that banks would not be prohibited from doing data processing work for lotteries by amending the Act as originally proposed, it would appear that Congress has made no effort to protect petitioners as a class, and that they should not be granted any standing. Similarly, Congress, by exempting single bank holding companies from the Bank Holding Company Act, has in effect permitted banks to indirectly engage in any outside activity including data processing for the public.

If standing be granted in the instant case and a decision on the merits ensues, regardless of the outcome, it will be just a beginning of a vast amount of litigation as most every case will differ in determining what is incidental and necessary to banking. Factors such as the capital structure of the bank, the nature and kind of its competition, the economics of large computers versus small computers, the percentage of data processing work done for itself as compared to other customers, the type and kind of data processing such as payroll accounts, accounts receivable, and limitless other evidentiary matters may well be pertinent, thus, to give to every competitor seeking to eliminate competition the right to challenge alleged ultra vires acts of national banks, would result in the courts taking over in large measure the supervisory powers of the various administrative agencies charged with the duty of regulating and controlling national banking associations.

It is respectfully requested that for all of the foregoing reasons, the Petition for Ceriotari be denied.

Respectfully submitted,

FALLON KELLY
500 Minnesota Building
St. Paul, Minnesota 55101
Counsel of Record for
Respondent American National
Bank and Trust Company

APPENDIX A

12 U.S.C. § 1861(c):

"(c) The term 'bank service corporation' means a corporation organized to perform bank services for two or more banks, each of which owns part of the capital stock of such corporation, and at least one of which is subject to examination by a Federal supervisory agency."

12 U.S.C. § 1862 (a):

"(a) No limitation or prohibition otherwise imposed by any provision of Federal law exclusively relating to banks shall prevent any two or more banks from investing not more than 10 per centum of the paid-in and unimpaired capital and unimpaired surplus of each of them in a bank service corporation."

12 U.S.C. § 1841(a):

"(a) 'Bank holding company' means any company (1) that directly or indirectly owns, controls, or holds with power to vote 25 per centum or more of the voting shares of each of two or more banks or of a company that is or becomes a bank holding company by virtue of this chapter or (2) that controls in any manner the election of a majority of the directors of each of two or more banks; and, for the purposes of this chapter, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor company became a bank holding company. Notwithstanding the foregoing, (A) no bank and no company owning or controlling voting shares of a bank shall be a bank holding company by virtue of such bank's ownership or control of shares in a fiduciary capacity, except as provided in paragraphs (2) and (3) of subsection (g) of this section, (B) no company shall be a bank holding company by virtue of its

ownership or control of shares acquired by it in connection with its underwriting of securities if such shares are held only for such period of time as will permit the sale thereof on a reasonable basis, and (C) no company formed for the sole purpose of participating in a proxy solicitation shall be a bank holding company by virture of its control of voting rights of shares acquired in the course of such solicitation."

12 U.S.C. § 1843(a):

"(a) Except as otherwise provided in this chapter, no bank holding company shall—

(1) after May 9, 1956, acquire direct or indirect ownership or control of any voting shares of any company which is not a bank, or

(2) after two years from the date as of which it becomes a bank holding company, or, in the case of any company that has been continuously affiliated since May 15, 1955, with a company which was registered under the Investment Company Act of 1940, prior to May 15, 1955, in such a manner as to constitute an affiliated company within the meaning of that Act, after December 31, 1978, retain direct or indirect ownership or control of any voting shares of any company which is not a bank or a bank holding company or engage in any business other than that of banking or of managing or controlling banks or of furnishing services to or performing services for any bank of which it owns or controls 25 per centum or more of the voting shares. * * *"

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1246

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., AND DATA SYSTEMS, INC., PETITIONERS

v.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, AND AMERICAN NATIONAL BANK AND TRUST COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE COMPTROLLER OF THE CURRENCY

The respondent Comptroller of the Currency does not oppose the granting of certiorari limited to the following question:

> Whether, in applying the principle that standing to complain that a competitor's activities are prohibited exists only if the plaintiff is a member of a class intended to be protected by the statute allegedly violated, standing may be rested solely on a subsidiary policy behind a *different* statute plainly inapplicable to the defendant competitor.

The foregoing question is identical to that presented by the Comptroller's petition for a writ of cer-

353-031—69

tiorari in *Camp* v. *The Wingate Corporation*, which is being filed contemporaneously herewith to seek review of a decision of the Court of Appeals for the First Circuit that is in explicit conflict with the decision below.[1]

STATEMENT

This is an action for declaratory and injunctive relief against the Comptroller of the Currency and the American National Bank and Trust Company. Petitioners, an association of data processing service companies and a member of the association, seek to invalidate a ruling by the Comptroller under 12 U.S.C. 24 Seventh, that, incidental to their banking services, national banks may make data processing services available to other banks or bank customers.

The district court dismissed the action for lack of standing (Pet. App. 13–22), and the Court of Appeals for the Eighth Circuit affirmed (Pet. App. 23–33). After an exhaustive analysis of the decisions of

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[1] The Comptroller's petition and the petition that has been filed in *Industrial National Bank of Rhode Island* v. *The Wingate Corp.*, No. 1408, O.T., 1968, both seek review of the First Circuit's decision in *The Wingate Corporation* v. *Industrial National Bank* (No. 7186, decided March 27, 1969). The same opinion also decided another case, *Arnold Tours, Inc.* v. *Camp* (No. 7192), in favor of the Comptroller's position, and a petition for a writ of certiorari has been filed by the plaintiffs, *Arnold Tours Inc., et al.* v. *Camp, et al.*, No. 1407, O.T., 1968. The Comptroller is contemporaneously herewith filing a brief in opposition to that petition, which raises the question of the standing of a national bank's competitor to challenge the bank's activities as *ultra vires* in the absence of any statutory protective purpose whatever. The First Circuit's opinion is set forth at Pet. App. 36–46.

this Court and of the various courts of appeals, the court below concluded that a competitor may challenge allegedly "illegal" competition only when he can show (1) that he has a legal right to be free from competition by reason of a governmental charter; (2) that specific legislation authorizes him as an "aggrieved person" to sue in the public interest; or (3) that he is a member of a class given express statutory protection against the competition. Since none of these situations was found to be present here, the court held that petitioners lack standing to attack the bank's activities as beyond the scope of the powers given national banks in the National Bank Act, 12 U.S.C. 24 Seventh. Petitioner's reliance upon a claimed protective purpose in the Bank Service Corporation Act of 1962, 12 U.S.C. 1861–1865, was held to have been "misplaced," since that Act was not alleged to have been violated (Pet. App. 32, n. 12).

DISCUSSION

1. As we have noted, the subsequent decision of the Court of Appeals for the First Circuit in *The Wingate Corporation* v. *Industrial National Bank,* which is the subject of our petition for a writ of certiorari being filed contemporaneously herewith, is in explicit conflict with the decision below. The *Wingate* case involved an identical attack by a data processing service company against the same ruling by the Comptroller and similiar activities by a national bank pursuant to the ruling. The First Circuit agreed with the court below on the general principle that the plaintiff would have standing only if it was the beneficiary

of a statutory purpose to protect it against competition (Pet. App. 38–44). It went on to hold, however, that one section of the Bank Service Corporation Act of 1962 had apparently been enacted to protect the plaintiff's class from competition by bank service companies. While no such company was involved in the case, the First Circuit considered that the Act also "arguably prohibits direct entry by national banks into the data processing service business" (Pet. App. 46), thus providing a sufficient indication of protection against competition to grant standing to the plaintiff to attack the allegedly unlawful ruling of the Comptroller. The First Circuit explicitly recognized that this conclusion conflicted with the decision in the instant case (Pet. App. 45 n.8).

We believe that the decision below was correct. Nevertheless, because of this conflict and because of the importance of the question (as shown in our petition in *Wingate*), it would be appropriate for the Court to grant certiorari in this case as well as in *Wingate*.

2. The petition in this case—while stating the question presented in terms of the *factual* situation involved—raises in its argument section broader issues than are raised in our *Wingate* petition. We submit that these broader issues need not be considered and that the grant of certiorari should be limited to the question as we have framed it above and in the *Wingate* petition.

After pointing out the conflict with the First Circuit's decision in *Wingate* (Pet. 4–5) petitioners go on to urge as an additional reason for granting certiorari

that the general principles followed below (and in *Wingate*) are inconsistent with an alternative holding by the Court of Appeals for the Fifth Circuit in *Saxon* v. *Georgia Ass'n of Independent Insurance Agents*, 399 F. 2d 1010. In that case the Fifth Circuit found a statutory purpose to protect the plaintiffs, but further commented that the plaintiffs would also have had standing simply as competitors complaining that the bank's activities were unlawful. Petitioners contend that the Court should therefore decide in this case that standing is established whenever a plaintiff is adversely affected *in fact* by activities that he contends are unlawful; in support of this position they further suggest that the Administrative Procedure Act's judicial review position, 5 U.S.C. (Supp. III) 702, has generally expanded the class of potential plaintiffs.[2] Pet. 5–10.

These broader questions are also raised in the pending petition for a writ of certiorari in *Arnold Tours, Inc., et al.* v. *Camp, et al.*, No. 1407, O.T., 1968.[3] As we show in the Comptroller's opposition to that petition and in the Comptroller's petition in *Wingate*, there is no reason for the Court to reconsider the established basic principle, reiterated as recently as last year in *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, that competition without more is insufficient to establish standing. Both the decision below and the

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[2] Petitioners admit (Pet. 10) that they did not raise the Administrative Procedure Act point below.

[3] See note 1, *supra*.

conflicting decision in *Wingate* are based upon that established principle, and they differ only as to the nature of the statutory protection that will suffice to support standing. And despite the broader alternative language in the Fifth Circuit's decision in the *Insurance Agents* case, that decision does not depend on anything more than the court's determination that the requisite statutory protection was present.

CONCLUSION

For the foregoing reasons, the Comptroller of the Currency does not oppose the grant of a writ of certiorari limited to the question stated at the beginning of this memorandum, but does oppose further consideration of the broader questions suggested in the petition.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.
ALAN S. ROSENTHAL,
STEPHEN R. FELSON,
Attorneys.

JUNE 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

BRIEF ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE

IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

Question Presented

Whether a firm engaged in the business of providing data processing services to the public—an unlicensed, unregulated business in which any member of the public can freely engage—has standing, under the Bank Service Corporation Act, the National Bank Act, or any other statute, to sue to enjoin a national bank from competing against such firm in said business, on the ground that engaging therein is beyond the powers of national banks under the National Bank Act.

Interest of Amicus Curiae

The American Bankers Association is a trade association having as members approximately 13,600 commercial banks, of which about 4,800 are national banking associations, chartered under and deriving their powers from the National Bank Act, commonly called national banks, and about 8,800 are State or District banks chartered under and deriving their powers from the laws of the several States and the District of Columbia.

While the specific issue which this Court is asked to review is technical in nature and of limited application—standing to sue, and more specifically whether the Bank Service Corporation Act gives plaintiffs standing to sue—the suits themselves involve issues of great significance to the future of commercial banking and of the nation's monetary and payments systems.

For this reason, the present status of the two cases in which writs of certiorari are sought—with the ADAPSO complaint dismissed for want of standing and the Wingate complaint sustained on the ground that standing is given by the Bank Service Corporation Act—can only lead to confusion and uncertainty in the banking industry, with consequent damage to that industry and those it serves. The American Bankers Association supports the ruling in the ADAPSO case; as Amicus Curiae, the Association submitted a brief to the Court of Appeals in each of the cases, arguing that the Bank Service Corporation Act does not give standing to sue national banks.

The ADAPSO and Wingate cases have the broadest implications for the dual banking system and the policy of "competitive equality" between national banks and State banks which underlies the dual banking system (see *First National Bank of Logan* v. *Walker Bank and Trust Company* (1966) 385 U.S. 252, 261). A narrow and restrictive interpretation of the powers of national banks under the National Bank Act would, of course, reduce the ability of all national banks to serve their customers and carry out their important functions. In addition, national banks, under a narrow and restrictive interpretation of the National Bank Act, would also be subjected to a serious competitive disadvantage in those States where State banks could continue to provide data processing services under State statutes specifically authorizing them to do so. On the other hand, in States where the banking codes contain provisions similar to, and now interpreted like, the provisions of the National Bank Act, a narrow and restrictive interpretation of the National Bank Act might result in reconsideration of the present

favorable interpretations and in changes to similar narrow interpretations of the State codes. While this would reduce the competitive disadvantage of the national banks, it would do so by reducing the ability of the State banks to acquire and use electronic data processing equipment. This would adversely affect the ability of the entire commercial banking system to carry out its vital function of providing the bulk of the nation's money supply in the form of demand deposits and to act as the nation's principal payments mechanism.

The American Bankers Association is convinced that commercial banks must be able over the coming years to provide the most advanced and effective services to their customers, if they are to continue to perform their essential banking role for the benefit of industry, agriculture, commerce, the Government, and the public, serving as the nation's principal payments mechanism during the developing period of automated payments and providing traditional and newly developing consulting, statistical, payroll, bookkeeping, and other financial services. In order to continue to provide such services and to compete with other banks and financial institutions over the coming years, banks must be able to make use of automated equipment, which is becoming increasingly sophisticated and increasingly expensive. The magnetic ink character recognition symbols (MICR), developed by The American Bankers Association, which are required by the Federal Reserve Board in order to make possible the use of automated equipment to handle the billions of checks which carry out most of the nation's transfers of funds, can be expected to lead into far more effective and efficient payments mechanisms through the use

of far more sophisticated and far more expensive equipment. Any action which would handicap banks in their ability to finance the acquisition of such equipment might seriously hamper the development of such new payments mechanisms and the resulting benefits to bank customers and the Government and the public generally.

It is the position of The American Bankers Association that banks may carry on the business of banking by the use of electronic data processing equipment; that such equipment may be used to perform traditional or newly developing banking services for bank customers; and that incidental to such banking services such equipment may be used to perform, or be made available for the performance of, other data processing services for bank customers. It is the position of The American Bankers Association that the power to use electronic data processing equipment in carrying on such activities is necessary and incidental to the business of banking and that such activities are authorized under the National Bank Act, as well as under most if not all State banking codes.

Current Status of Automation and Automated Customer Services in Banking

The American Bankers Association has conducted extensive industry-wide surveys of automation and automated customer services in its member banks, in 1963, 1966, and 1969. In addition, the Association conducted a similar survey of automated customer services in 1967.

Tentative reports from the 1969 survey, the full results of which have not yet been tabulated, show that, of the nation's 13,000 commercial banks, more than 1,000 have on-premise computers, while more than 5,000

use off-premise computer services provided by other banks, by establishments run by cooperating banks, or by commercial service bureaus. The principal internal applications to which these electronic data processing facilities have been put by the banks using them include automated processing of demand deposits, savings deposits, installment credit, and the banks' own payrolls.

The tentative reports from the 1969 survey also indicate that some 2,000 of these banks, including virtually all of the larger banks, provide automated customer services to other banks and bank customers or plan to do so within six months. The principal automated services offered by these banks, according to the 1969 survey, are payroll processing, account reconciliation, correspondent bank services, and accounts receivable.

The survey did not show how many of the banks using computer services and offering them to customers were State banks and how many were national banks. However, it is clear that the use of computers and the offering of automated customer services is not limited to national banks.

In 1967, after the institution of the ADAPSO case, a survey of State statutes and rulings by State bank supervisors on the subject of automated customer services was undertaken. In several States, statutes were found specifically authorizing State banks to provide data processing services for their customers.[1] In many

[1] See, for example, Massachusetts Anno. Laws § 48 (15), Mississippi Code § 5224(i), Missouri Anno. Code § 362.105(11), and New Jersey Statutes Annotated 17:9A-25(14). Since 1967 the following states have also enacted similar statutes: Iowa 1969 Laws Division VIII § 804, Ohio Rev. Code Anno. § 1107.34, West Virginia 1969 Laws § 31A-4-37.

other States, statutes were found authorizing State banks to perform incidental banking services, generally comparable to the corresponding provisions of the National Bank Act. In addition, advice was received from virtually all State bank supervisors to the effect that they had approved the performance of data processing services by State banks under their jurisdiction, under the terms of the applicable State statutes. Copies of several of these letters are set forth in the Appendix.

The importance of this issue in the several States, particularly in view of the problems inherent in parallel banking regulation under the dual banking system, makes it especially inappropriate for a decision on the powers of national banks to be reached on jurisdictional grounds in one Circuit and on the merits in another Circuit.

Conclusion

In view of the importance of the issues involved in the above-entitled cases to the banking industry and its future, and to those it serves, and in view of the direct conflict between the United States Courts of Appeals for the First and the Eighth Circuits, The American Bankers Association urges that the petitions for writs of certiorari should be granted.

Respectfully submitted,

MATTHEW HALE
General Counsel
The American Bankers Association
815 Connecticut Avenue, N. W.
Washington, D. C. 20006
Attorney for Amicus Curiae

June 12, 1969

APPENDIX

STATE OF CALIFORNIA
STATE BANKING DEPARTMENT
SAN FRANCISCO, CALIFORNIA

November 27, 1967

Matthew Hale, Esquire
General Counsel
The American Bankers Association
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

Dear Matt:

This is in reply to your letter of October 25, 1967, regarding the data processing service cases now pending in the federal courts in Minnesota and Rhode Island.

We have not promulgated any formal regulation or ruling on whether a California state bank may provide data processing services for its customers. However, it is our view that furnishing data processing services to customers is within the incidental powers of a state bank, and several of our state banks are currently offering these services to their customers.

We will be watching the progress of the litigation with interest.

If I can be of further assistance, please don't hesitate to call.

Best regards.

Sincerely,
JAMES M. HALL
James M. Hall
Superintendent of Banks

[CALIFORNIA

The California Financial Code Annotated, Section 105, authorizes a commercial bank "generally to transact a commercial banking business".]

STATE OF IDAHO
DEPARTMENT OF FINANCE
BOISE 83707

November 1, 1967

Mr. Matthew Hale
General Counsel
THE AMERICAN BANKERS ASSOCIATION
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

Dear Mr. Hale:

Thank you for your letter of October 25, 1967.

The subject under discussion is not one that has been tested in Idaho Courts; but, as I understand it, there are certainly no prohibitions relative to this in the Idaho code.

I would like to further state that this office enthusiastically supports the use by national or state banks of EDP on a service or fee basis, and consider its usage as such a very proper adjunct to "banking."

Should you need additional help in any way, shape, or form, we would certainly like to volunteer our services.

Best regards,

JOHN D. SILVA
John D. Silva
Commissioner

JDS:lm

STATE OF INDIANA
DEPARTMENT OF FINANCIAL INSTITUTIONS
1024 INDIANA STATE OFFICE BUILDING
INDIANAPOLIS 46204

November 9, 1967

Mr. Matthew Hale, General Counsel
The American Bankers Association
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

Dear Matt:

Thank you for your letter of October 30 and a copy of the ABA's motion.

You are correct that we have interpreted that Section 18-1103 of the Indiana Statutes provides authority for state chartered banks to sell data processing services to customers.

We have not seen it necessary to promulgate any rules or regulations restricting the sale of services of data processing or establishing guide lines governing such services. I hope that these powers can be preserved for commercial banks.

Best regards.

Cordially,
DON
Donald H. Sauer, *Director*

DHS:tw

[INDIANA

The Indiana Statutes Anno. Section 18-1103 authorizes banks "to exercise all the powers incidental and proper, or which may be necessary and usual in carrying on a general banking business."]

STATE BANKING DEPARTMENT
ONE NORTH CHARLES—BLAUSTEIN BUILDING
BALTIMORE, MARYLAND 21201

November 1, 1967

Matthew Hale, Esquire
General Counsel
The American Bankers Association
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

Re: Association of Data Processing Service Organizations, Inc. and Data Systems, Inc.

v.

William B. Camp, Comptroller of the Currency of the United States, and American National Bank and Trust Company (U. S. District Court, Minnesota)

and

The Wingate Corporation v. Industrial National Bank of Rhode Island (U. S. District Court, Rhode Island)

Dear Mr. Hale:

I wish to acknowledge your letter of October 30 with reference to the above entitled subject.

In reply, I wish to advise you that all or most of the larger State banking institutions in this State provide data processing services. There is no State law or regulation by this Department prohibiting the use of data processing services and this Department considers said services as one of the usual services in carrying on the business of banking. Many of the small State banks probably do not pro-

vide data processing services, but this is not because of any State law or regulation by this Department prohibiting it.

I trust that this fully answers your inquiry, I am

Very sincerely yours,

WILLIAM A. GRAHAM
William A. Graham
Bank Commissioner

WAG/vp

[MARYLAND

Maryland Code Anno. Art. 11, Sec. 31(6) permits banks to exercise "all such powers as shall be usual in carrying on the business of banking".]

THE STATE OF NEW HAMPSHIRE
BANK COMMISSIONER
CONCORD
03301

97 North Main Street

November 15, 1967

Mr. Matthew Hale, General Counsel
The American Bankers Association
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

Dear Mr. Hale:

We are answering your letter dated October 25, 1967 addressed to Commissioner Dunn.

Some two and one-half years ago one of our banks asked if they could provide a business man with a record service. It would involve the receiving of various sums of money monthly from clients and rendering the business an accounting.

New Hampshire RSA 392:33 states in part that a commercial bank can do a general banking business.

This department has administered this statute under the interpretation that a bank may render data processing services to bank customers.

Very truly yours,

JAMES W. NELSON
James W. Nelson
Deputy Bank Commissioner

JWN/rmh

OFFICE OF STATE EXAMINER
STATE OF NORTH DAKOTA
1301 STATE CAPITOL
BISMARCK, NORTH DAKOTA
58501

November 16, 1967

Mr. Matthew Hale, General Counsel
The American Bankers Association
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

Re: Association of Data Processing Service Organizations

vs.

American National Bank, et al

Dear Mr. Hale:

In reply to your letter of October 30, 1967, it is the opinion of this office that banks in North Dakota do have authority to provide data processing services to their customers. We concur with your interpretation of Section 6-03-02 of the North Dakota Century Code, giving banks this power. Mr. Daner, Secretary of the North Dakota Bankers Association, informed you of Section 6-03-

49.1, which authorizes North Dakota banks to invest in Service Corporations, which further strengthens your contention.

The State Banking Board has not issued any regulations concerning data processing.

Since this is a small, sparcely populated state, banks are the only logical business to make data processing facilities available to our people. The bank involved in the above case is providing this service to several North Dakota banks now, and without the help of this and other large out-of-state banks, this service would not be available to North Dakotans. I commend the American Bankers Association in joining in action to defend banking's position. A decision favorable to the defendants is probably more important to North Dakota Banks and our people than to other areas.

Sincerely,

H. L. THORNDAL, JR.
H. L. Thorndal, Jr.
State Examiner

HLT:b
cc to John F. Nash, President
American National Bank
St. Paul, Minnesota

[NORTH DAKOTA

North Dakota Century Code Anno. Section 6-03-02 (8) permits banks to exercise "all such incidental powers as shall be necessary to carry on the business of banking".]

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING
HARRISBURG

THE SECRETARY

November 1, 1967

Matthew Hale, Esquire
General Counsel
The American Bankers Association
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

Dear Mr. Hale:

I am most happy to respond to your request of October 30, 1967 and provide you with information concerning electronic data processing services provided to customers by banks in Pennsylvania.

The Banking Law Commission, when drafting our Banking Code of 1965, saw fit to provide powers for banks incidental to the conduct of banking business through Section 315 (e) of the Code, which they intended to include the sale of data processing services as is indicated in the Commission's comments at the end of the Section.

Further, Section 202 (d) of the Code specifically provides that "an incorporated institution shall have in addition to other powers granted by this Act or its articles * * * the power to acquire and hold in an amount approved by the Department, * * * shares of stock of a corporation organized solely for the purpose of providing data processing facilities for the institution or for the institution and others; * * *"

The ability to sell "free time" on a computer is most important to many banks who need computerized accounting for their own operations and yet do not have the volume of work to fully utilize the equipment themselves. This creates a very expensive investment that would be beyond the reach of a great number of institutions unless they could recoup their investment by the sale of services to customers and others.

The Department of Banking encourages such enterprise in the banking institutions subject to its supervision, to the extent it does not interfere with or detract from the efficiency of the banks' own accounting procedures. The only instructions this Department has formulated pertain to information required by examiners in the course of an examination of a bank utilizing data processing for its own accounting. I enclose a copy of the outline we have distributed to State-chartered banks.

I trust this information will be of some benefit to you and should there be additional data you need which this Department might have available, please don't hesitate to contact me.

Sincerely,

G. A. PATTERSON
G. Allen Patterson
Secretary of Banking

STATE OF NEW YORK
BANKING DEPARTMENT
100 CHURCH STREET
NEW YORK, N. Y. 10007

November 16, 1967

Matthew Hale, Esq.
General Counsel
The American Bankers Association
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

Dear Mr. Hale:

Superintendent Wille has referred to me your letter of October 24, 1967, inquiring whether the Banking Department takes the position that State-chartered banks and trust companies may provide data processing services to their customers.

As noted in your letter, Section 96(1) of the New York Banking Law empowers State-chartered banks and trust companies "to . . . exercise all such incidental powers as shall be necessary to carry on the business of banking." While a formal ruling on the question posed in your letter has not been issued or requested, it is the position of the Department that State-chartered banks and trust companies are authorized by Section 96(1) to offer data processing services to customers where the data processing equipment was acquired primarily for the use of the bank or trust company.

You also requested "copies of any rules, regulations or other instructions . . . issued in connection with data processing by state banks in New York." The only pertinent directives which the Department has issued are Supervisory Circular Letters Nos. CB-11 and CB-33, copies of which are enclosed. These Supervisory Circular Letters are currently being reviewed and updated, but no substantial revision is likely. If, however, you feel that they might be helpful, we will gladly forward you revised copies as soon as they become available.

We trust this will furnish the information you requested.

Sincerely,

CHRISTOPH H. SCHMIDT
Christoph H. Schmidt
Deputy Superintendent and Counsel

Enclosures

FILE COPY

FILED
SEP 8 1969
CLERK

In The

Supreme Court of the United States

October Term, 1969

No. 85

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,
Petitioners,

vs.

WILLIAM B. CAMP, Comptroller of the Currency of the United States, and AMERICAN NATIONAL BANK AND TRUST COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE PETITIONERS

MILTON R. WESSEL
425 Park Avenue
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Investment Co. Institute v. Camp, No. 21,662, D.C. Cir., July 1, 1969, CCH Fed. Banking L. Rep.:
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39 Stat. 753 (1916), 12 U.S.C.A. §92 24
60 Stat. 243 (1946), 5 U.S.C. §1009(a) (1958) 38

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76 Stat. 1132 (1962), 12 U.S.C. §1864 (1964) 2, 7, 30, 34
80 Stat. 392 (1966), 5 U.S.C. §702 (Supp. II, 1965-66) 2, 7, 38
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MISCELLANEOUS:

9 Administrative Law Bulletin 122 (1957) 30
Bickel, The Supreme Court 1960 Term, Forward: The Passive Virtues, 75 Harv. L. Rev. 40 (1961) 22
Carpenter, Interference with Contract Relations, 41 Harv. L. Rev. 728 (1928) 21
Davis, A. K., Banking Regulation Today: A Banker's View, 31 Law & Contemp. Prob. 639 (1966) 15
Davis, K. C., Administrative Law Treatise, Vol. 3, pp. 208-294 (1958) 10, 20, 39
Davis, K. C., Discretionary Justice, A Preliminary Inquiry 159 (1969) 41
Economic Analysis of the Data Processing Service Industry (1967) 13
Hart and Wechsler, The Federal Courts and the Federal System 174 (1953) 9
Jaffe, Judicial Control of Administrative Action 324, 459-545 (1965) 13, 18, 21, 39, 42
Motion for Leave to File Brief on Behalf of the American Bankers Association as Amicus Curiae in Support of Petitions for Writs of Certiorari, June 12, 1969, p. 7 13
Petition by Comptroller of the Currency for Writ of Certiorari in Camp v. Wingate Corp., No. 1511, Oct. Term 1968, p. 9 14
1 Schwartz, A Commentary on the Constitution of the United States, Part I, The Powers of Government 440-41 (1963) 24
Wall Street Journal, March 27, 1968, p. 1 16
Wall Street Journal, Sept. 21, 1967, p. 28 15
Wright, Federal Courts 38 (1963) 20

In The

Supreme Court of the United States

October Term, 1969

No. 85

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,
Petitioners,

vs.

WILLIAM B. CAMP, Comptroller of the Currency of the United States, and AMERICAN NATIONAL BANK AND TRUST COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the district court is reported in 279 F.Supp. 675 (D. Minn. 1968) (A. 19-29). The opinion of the court of appeals is reported in 406 F.2d 837 (8th Cir. 1969) (A. 31-41).

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1969 (A. 42). The petition for a writ of certiorari was filed on April 10, 1969, and granted on June 23, 1969 (37 U.S.L.W. 3493) (A. 43). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 24 (Seventh) of the National Bank Act, 13 Stat. 101 (1864), 12 U.S.C. §24 (1964):

"§24. Corporate powers of associations.

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

. . . .

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; . . ."

Section 4 of the Bank Service Corporation Act, 76 Stat. 1132 (1962), 12 U.S.C. §1864 (1964):

"No bank service corporation may engage in any activity other than the performance of bank services for banks."

Section 10 of the Administrative Procedure Act, 80 Stat. 392 (1966), 5 U.S.C. 702 (Supp. II, 1965-66):

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Paragraph 3500, Comptroller's Manual for National Banks (Oct. 15, 1966 Ed.):

"Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers."

QUESTION PRESENTED

Whether independent data processing service organizations, whose business is to provide data processing services for the general business public, have standing to assert a claim (a) that national banks are illegally offering competing data processing services to the general business public and (b) that the Comptroller of the Currency has illegally authorized national banks to perform such services.

STATEMENT OF THE CASE

As petitioners' complaint was dismissed by the district court on motion before trial and before any information was obtained by any party in pre-trial discovery proceedings, this statement of the case is necessarily limited to the pleadings on file (A. 4-14).

Petitioners are the Association of Data Processing Service Organizations, Inc. (referred to as "ADAPSO"), and Data Systems, Inc., a Minnesota corporation and a member of that Association (referred to as "Data Systems"). The members of ADAPSO are engaged in the business of performing data processing services for the general business community. For some time prior to the commencement of this action, the respondent American National Bank and Trust Company of St. Paul, Minnesota, a national bank (referred to as "American Bank") had been similarly engaged in the business of performing data processing services for the general business community. In fact, respondent American Bank, at the time petitioners began their action, was performing or preparing to perform such services for the Minnesota State Capitol Credit Union, with whom petitioner Data Systems had previously agreed to perform such services, and for Carlen Industries, Inc., with whom Data Systems had previously been negotiating regarding such services (Petitioners' Complaint, pars. 13-16, A. 7-8). Petitioners brought this action to have American Bank's data processing activities of this nature

declared unlawful, to have them enjoined, and for damages resulting from these illegal activities.

Petitioners also sought declaratory and injunctive relief against the respondent Comptroller of the Currency (the "Comptroller"), as he had purported to authorize such activities in his 1966 ruling, which stated as follows:

> "Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers." *Comptroller's Manual for National Banks* (October 15, 1966 Ed.), par. 3500.

Petitioners have alleged, and for purposes of this review these allegations must be accepted, that these activities by the American Bank and the above ruling by the Comptroller are illegal under the National Bank Act, 12 U.S.C. §24 (1964), and that if these activities are continued under the umbrella of this ruling they will cause substantial and irreparable harm to petitioners.

Prior to trial, respondents moved to dismiss the complaint on the grounds that petitioners lacked standing to maintain this action (A. 15-17). The district court granted the motion (A. 18-19), and the court of appeals affirmed the judgment of dismissal (A. 42).

SUMMARY OF ARGUMENT

I.

In recent years, national banks have entered into several different fields of business not formerly considered as being within the business of banking. In all instances, the Comptroller of the Currency authorized these bank activities. Non-bank competitors have brought suit to enjoin both these bank activities and the Comptroller's actions in authorizing them. The basis for these lawsuits has been the assertion that the banks have engaged in activities not authorized and thus

prohibited by the federal banking laws. Various lower courts have split sharply on the question of the claimants' standing to bring these actions. These conflicts among the courts indicate that a fundamental re-examination of the rules of standing is required. This re-examination compels the conclusion that there should be standing for these claimants to assert their claims of illegal action.

In *Flast v. Cohen,* 392 U.S. 83 (1968), this Court stated that the concept of standing is related to the restrictions of Article III of the Constitution limiting the federal judicial power to cases and controversies. In constitutional terms, the question of standing is whether a claimant has alleged such a personal stake in the outcome of the controversy as to assure concrete adverseness of a dispute which is capable of judicial resolution.

When the present case is considered in terms of the constitutional requirements of standing, there is no doubt that a competitor has standing within the limits of Article III to assert his claim of illegal competition. His personal stake in the litigation is direct and important. Consistent with this analysis, this Court has found no constitutional bar to actions based on a competitive interest. *FCC v. Sanders Bros. Radio Station,* 309 U.S. 470 (1940); *Chicago v. Atchison, T. & S.F. Ry.,* 357 U.S. 77 (1958).

Granting the constitutional power to entertain such claims, an examination of the policy considerations behind the rules of standing indicates that there are no valid reasons to deny standing to competitors.

To the extent that the rules of standing are designed to exclude persons who have no personal interest in the litigation, the rules do not apply to the present case. To the extent that these rules are designed to bar hypothetical, friendly or collusive lawsuits, or disputes not capable of judicial resolution, these rules do not apply to the present case.

The underlying substantive issues involved in the merits of the present case are vitally important both to the parties and to the public. To the extent that the rules of standing have flexibility in any particular case depending on the importance of the substantive issues involved, the present case is a compelling one in favor of standing, involving as it does the legality of actions taken by the banking industry, where public interests are of paramount importance.

Competitors are the most natural, and probably the only, persons to bring to the courts these important questions of the legality of bank actions.

II.

The doctrine of *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1939), denying standing to competitors because they lack "legal rights," is unsound because the result in that case was not based on a proper application of the underlying considerations which should frame and limit the rules of standing. The rationale of this decision has been subject to varying interpretations, but under any interpretation it would be merely coincidental if an application of the rule of that case carried forward the principles behind the rules of standing. The rule of that case should therefore not be extended to the present case.

Instead, whenever there is presented to the courts a constitutional case or controversy, where the claimant has been injured in fact, and where important public issues are involved, that case should be heard unless Congress has barred judicial review. Other cases have accepted this reasoning, including cases from this Court. *Chicago v. Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958).

III.

Petitioners have standing under the settled rule that if Congress has indicated a legislative purpose to protect a competitive interest, that interest supplies standing to complain of its infringement.

In the Bank Service Corporation Act, 12 U.S.C. §1864 (1964), Congress clearly indicated a legislative purpose to protect data processors against bank competition. Specific amendments to the proposed Act, while it was pending in Congress, were made to protect this interest. A substantial body of legislative history reveals that certain key legislators were of the opinion that the Act limited banks as well as service corporations from entering the data processing business.

Even if the Act affects only service corporations, it is sufficient to give standing to petitioners under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §702 (1966), as being a relevant statute closely related to the statute allegedly violated.

ARGUMENT

I.

AN ANALYSIS OF THE CONSIDERATIONS UNDERLYING THE RULES OF STANDING COMPELS THE CONCLUSION THAT COMPETITORS SHOULD HAVE STANDING TO ASSERT CLAIMS OF UNLAWFUL COMPETITION AGAINST NATIONAL BANKS AND CLAIMS OF UNLAWFUL AUTHORIZATION OF SUCH COMPETITION AGAINST THE COMPTROLLER OF THE CURRENCY.

This Court has characterized the law of standing as a "complicated specialty of federal jurisdiction." *United States ex rel. Chapman v. FPC,* 345 U.S. 153, 156 (1953). Nowhere are these complications more sharply highlighted than in the recent cases involving challenges to the entrance of national banks into fields of business activity not traditionally encompassed within the business of banking. These cases reflect bank entrance into the data processing business (this case and *Wingate Corp. v. Industrial Nat. Bank,* 408 F.2d 1147, 1st Cir. 1969), the travel agency business. (*Arnold Tours, Inc. v. Camp,* 408 F.2d 1147, 1st Cir. 1969),

the business of dealing in revenue bonds (*Baker, Watts & Co. v. Saxon,* 261 F.Supp. 247, D.D.C. 1966, *aff'd sub. nom. Port of New York Authority v. Baker, Watts & Co.,* 392 F.2d 497, D.C. Cir. 1968), the investment fund business (*Investment Co. Institute v. Camp,* No. 21,662, D.C. Cir. July 1, 1969, CCH Fed. Banking L. Rep. ¶95,157), and the insurance business (*Saxon v. Georgia Ass'n of Ind. Ins. Agents, Inc.,* 399 F.2d 1010, 5th Cir. 1968). In each case, the Comptroller authorized the national bank activity in question. In each case, a competitor brought suit to have the competitive activities enjoined. In four of the cases (the *Wingate* case, the *Baker, Watts* case, the *Investment Co. Institute* case, and the *Georgia Ins. Agents* case) the courts held the competitor had standing. In two cases (this case and the *Arnold Tours* case) the courts held the competitors lacked standing. In two of the cases where standing was found (the *Investment Co. Institute* and the *Georgia Ins. Agents* cases), the three judges hearing the particular case could not agree on the reasons for upholding standing and one judge on each court felt compelled to issue a concurring opinion on this question.

Surely the divergent results reflected in these cases in essentially similar situations indicate that the present rules of standing in this area are not working satisfactorily and compel a fundamental reconsideration of these rules. We believe that this reconsideration leads most reasonably to the conclusion that competitors of the national banks are entitled to challenge allegedly unlawful national bank activities and allegedly unlawful rulings by the Comptroller authorizing these activities.

The most searching recent analysis of the policies behind the law of standing is to be found in *Flast v. Cohen,* 392 U.S. 83 (1968). In that case Chief Justice Warren began with the premise that Article III of the Constitution restricts the

judicial power of the federal courts to "cases" and "controversies." One aspect of this limitation on the federal judicial power has been framed in terms of standing:

> "Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast v. Cohen,* 392 U.S. at 101.

How is a court to determine whether a dispute before it satisfies the constitutional requirements relating to standing? This determination must be made by an inquiry into the relationship between the claimant and his claim. (*Flast v. Cohen,* 392 U.S. 99):

> "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' Baker v. Carr, 369 U.S. 186, 204 (1962)."

This concept of standing had been phrased in similar terms some years before:

> "More precisely stated, the question of standing in this sense is the question whether the litigant has a sufficient personal interest in getting the relief he seeks, or is a sufficiently appropriate representative of other interested persons, to warrant giving him the relief, if he establishes the illegality alleged—and, by the same token, to warrant recognizing him as entitled to invoke the court's decision on the issue of illegality." Hart and Wechsler, *The Federal Courts and the Federal System* 174 (1953).

When standing is viewed in terms of "personal stake" or "personal interest" in the outcome of litigation there is no question that, logically, a competitor will have standing to challenge both allegedly illegal competition and the adminis-

trative action authorizing such competition. The personal stake or interest of a competitor is second to none in such situations. Consistent with these principles, this Court has repeatedly allowed a competitor standing to challenge allegedly unlawful competition, thus establishing beyond any doubt that Article III is no bar to suits of this nature.

FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940);
Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942);
The Chicago Junction Case, 264 U.S. 258 (1924);
Frost v. Corporation Comm'n, 278 U.S. 515 (1929);
Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958).

With the constitutional power allowing competitors access to the federal courts being firmly established, it becomes appropriate to examine the considerations which *as a matter of policy* should be weighed in determining whether to deny particular claimants access to the courts to hear their claims. When these considerations are weighed in the present case, the scale tips heavily in favor of permitting these claims to be heard.

1. Perhaps the most fundamental reason for hearing such cases flows from the nature of the petitioners' claim: they will, in fact, suffer substantial harm from allegedly illegal bank activities which have been authorized by allegedly illegal governmental action. As a first principle, the courts should be open to redress harm resulting from unlawful action:

> "The reasons in favor of permitting a challenge of governmental action by one who is in fact adversely affected by that action are very powerful. The strongest reason is the principle of elementary justice that one who is in fact hurt by illegal action should have a remedy." 3 Davis, *Administrative Law Treatise* 211 (1958) [hereinafter cited as *Davis*].

Applying this principle to the general area of allegedly illegal competition by national banks, there can be little doubt that non-bank businesses are subject to material harm from bank invasion of their areas of business endeavor. For example, in the investment fund field, the Comptroller has predicted that within ten years commercial banks "might capture as much as two billion dollars of mutual fund business." *Hearings on H.R. 8499, 9410 before the Commerce and Finance Subcommittee of the House Committee on Interstate and Foreign Commerce,* 88 Cong., 2d Sess. 26 (1964).

In the particular case before this Court, there can be no doubt of harm to the individual petitioner, Data Systems. The complaint in this action alleges that Data Systems had reached an agreement with a particular customer to provide data processing services and that thereafter the respondent bank supplanted Data Systems as the supplier of the data processing services (Paras. 13-14, Complaint, A. 7). Of course, petitioners' complaint was dismissed on motion before there was any opportunity to develop a concrete record on the extent of the harm, but the complaint alone is clearly sufficient to support at this point a preliminary finding of injury in fact. (The complaint having been dismissed before trial, its allegations of fact must be accepted for purposes of this review.)

Thus, to the extent that the restrictive rules of standing are designed to bar claimants who have no personal interest in the outcome of the litigation, the rules surely have no application to the present case.

2. Access to the courts presumably will be denied where the courts lack confidence that "the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor" required to

assure that the controversy will be "capable of judicial resolution." *Flast v. Cohen,* 392 U.S. at 106.

The present case presents in particularly sharp focus the "concrete adverseness" required under these principles. If the merits of the present case are ever reached, the specific clash between Data Systems and the American National Bank over specific customers insures the development of a full record regarding the issues involved in this case. The setting of this litigation establishes beyond doubt that this case is *not* one where the claimant "seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." *Flast v. Cohen,* 392 U.S. at 106.

The twofold task of the federal courts in this type of case is familiar and traditional: to determine whether certain conduct is prohibited by statute, and to determine whether administrative action has exceeded statutory authority. The basic relief requested by petitioners—injunction of illegal action—presents no unusual problems for a federal court. It is obvious that the controversy is "capable of judicial resolution."

3. A further reason not to deny access to the courts in this case stems from the importance of the underlying substantive issues involved, both to petitioners and to the public. Considerations of this nature have recently been explicitly noted by the courts. *Investment Company Institute v. Camp,* No. 21,662, D.C. Cir., July 1, 1969. A thoughtful commentator has also suggested this approach.[1]

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[1] "Our analysis of *Sanders* and of public actions generally suggests that the line between legal grievance and a factual grievance is often difficult to draw, just as it may be difficult to determine whether an issue is 'big' enough to concern 'the public.' Where the classification of the grievance is inconclusive, judicial discretion in terms of the size, urgency, and clarity of the issue at stake may be a useful tool in the decision to take jurisdiction. Dryly techni-

From the standpoint of both petitioners' "private" interest and the "public" interest in the banking system the present case is particularly appropriate for judicial review. Unquestionably, the data processing service industry is a significant and growing segment of American industry. A survey undertaken by petitioner ADAPSO in 1966 estimated that in 1970 the revenue for the data processing service industry would exceed one and one quarter billion dollars. *An Economic Analysis of the Data Processing Service Industry*, p. 11 (published in March, 1967, by the Association of Data Processing Service Organizations, Inc.).

The survey further indicated that competition from banks is a significant factor in the data processing service industry. *Economic Analysis, supra*, pp. 9-10.

A recent survey conducted by the American Bankers Association indicates that some 2,000 banks, including almost all of the larger banks, provide or intend shortly to provide data processing services to other banks and bank customers. See *Motion for Leave to File Brief on Behalf of the American Bankers Association as Amicus Curiae in Support of Petitions for Writs of Certiorari*, June 12, 1969, filed in these proceedings, p. 7. Certainly these surveys reveal a significant area of competition.

The Comptroller himself acknowledges the importance of the problems involved, when he notes that in 1967, 82 per cent of banks with fifty million to one hundred million dollars in assets offered computer services to customers; the

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cal issues, issues of peripheral relevance to the administrative task, issues not presently well-focused, issues better handled elsewhere need not be decided by a court or forced upon an agency, certainly not at the suit of persons whose claim to justice or to the attention of this forum is marginal. On the other hand, in a case where the sense of personal grievance although acute is not clearly grounded in law, a court may appropriately intervene to correct clear illegality even though 'the public' is not overly concerned." Jaffe, *Judicial Control of Administrative Action* 527-28 (1965). [Hereinafter cited as *Jaffe*.]

figure rose to 98 per cent of banks with over five hundred million in assets. *Petition by Comptroller of the Currency for Writ of Certiorari in Camp v. Wingate Corp.*, No. 1511, Oct. Term 1968, p. 9. In effect, the Comptroller argued in his petition in *Wingate* that because of the importance to the banking industry of the questions raised in these cases, this Court should reverse a lower court decision that allowed the merits of the questions to be reached.

Thus, from the viewpoint of all parties, the subject matter of the litigation clearly involves questions of major importance. This case, however, assumes even greater significance when consideration is given to the vital *public* interest in insuring that the nation's banking laws are not violated. The sensitive nature of the banking industry has been repeatedly recognized by the courts,[2] by Congress,[3] by admin-

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[2] "No doubt Congress has continuously, from 1864 to the present, been 'very careful' (see *infra*) in restricting the activities of banks . . . ." [T]he thrust of the close regulation of banks is for purposes of stability . . . ." *Wingate Corporation v. Camp*, 408 F.2d at 1151.

"A grocery store or data processing company failure or bankruptcy would be unfortunate and cause the proprietors and owners to lose their investment, but a bank failure would cause not only loss of the owner's investment but also loss to many unwary members of the public who are depositors." *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 279 F.Supp. 675, 680 (D. Minn. 1968).

[3] "Generally, banks have been prohibited from carrying on any business other than that of banking. This prohibition, which has been an accepted tradition throughout the banking industry, is grounded upon the conviction that banking is a quasi-public industry. Therefore, the chartering of banks has been subject to Government approval, and the continuing solvency of banks has been zealously guarded by the chartering authority. One of the principal means of guarding that solvency has been by limiting the activities, investment or otherwise, in which banks can engage." *S. Rep. No. 2105*, 87th Cong., 2d Sess. 10 (1962) (supplemental views of Senators Proxmire, Douglas, and Neuberger).

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Undeniably, entry by national bank
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data processing equip-
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[4] "Chairman Martin noted that the principal company field arise from two circumstances:

. . . .

(2) The combination under single control ing enterprises, permitting departure from th tions should not engage in business wholly un bination involves the lending of depositors' business enterprise, not connected with bank of trusteeship." *S. Rep. No. 1095*, 84th Cong

roblems in the bank holding

f both banking and nonbank- principle that banking institu- lated to banking. Such a com- oney, whereas other types of g, do not involve this element 1st Sess. 2 (1955).

[5] "Bank regulation in this country dates back n ter. It came into being as soon as there was failure could be more destructive to individu failure of any other type of enterprise. This ties for the most part are held by businesses circulating medium. Accordingly, the closi hardship upon the individual by destroying able—a portion of his monetary resources, portant, a bank failure frequently paralyzed munity. On occasion, when failures were m the nation, was prostrated." Archie K. Dav Association, 1966, *Banking Regulation Toda* Contemp. Prob. 639 (1966).

re than a century and a quar- eneral realization that a bank and to a community than the s simply because bank liabili- and individuals and constitute of a bank not only worked r making temporarily unavail- t, also, and perhaps more im- he economic life of the com- erous, an entire state, or even , President, American Bankers *A Banker's View*, 31 Law &

[6] In 1967, company officials of Villager, Inc., l a new computer for a 40% drop in profits in t ter, in which profits dropped from $1,790,9 $1,001,103. *Wall Street Journal*, September

ned the high cost of installing company's second fiscal quar- 4 in a comparable quarter to 1, 1967, p. 28.

formance of data processing services.[7]

In view of these hazards, it is of major public interest to determine whether national banks are lawfully permitted to engage in the business giving rise to the risks. But who will protect this public interest?

In the first instance, the Comptroller of the Currency has been granted by Congress the authority to supervise the banking system. 38 Stat. 261 (1913), 12 U.S.C. §1 (1964). However, it has been repeatedly held that the Comptroller's decisions are subject to judicial review.

First Nat'l Bank v. Saxon, 352 F.2d 267 (4th Cir. 1965); *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8th Cir. 1966).[8]

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[7]In *Clements Auto Co. v. Service Bureau Corp.*, 298 F.Supp. 115 (D. Minn. 1969), the court held a data processing company liable for damages of $480,811.33 for misrepresenting the necessity for, and benefits to be expected from, the installation of a data processing system for inventory control.

The *Wall Street Journal*, March 27, 1968, p. 1, reported a judgment against International Business Machines for $53,200 for computer programming errors causing failure of a computer to properly perform billing and inventory control services for a business concern.

[8]In *Webster Groves*, the court stated as follows:

"The Comptroller takes the position that neither the appellant nor any of the competitor banks have a standing to challenge the chartering of a new national bank; that the chartering of a new national bank is discretionary and is not subject to judicial review . . . .

"We believe that competing banks, as interested parties, have a right to challenge illegal acts of the Comptroller and that the Comptroller's discretionary actions are not immunized from judicial review . . . . (p. 384.)

"The Comptroller, however, must be subordinate to the law from which he received his authority, and is subject to the limitations imposed by that law. Therefore, if he acts in excess of his statutory grant of power, acts arbitrarily or capriciously, abuses his discretion, or unlawfully discriminates in violation of the Constitution, he is certainly subject to restraint by the courts . . . . (p. 387.)

"The Comptroller is also asserting that a competitor has no standing to object to lawful competition. With this rule we find no fault, but the banks surely have the standing to object to illegal competition. Frost v. Corporation Commission of Oklahoma, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483 (1929); National Bank of Detroit v. Wayne Oakland Bank, 252 F.2d 537 (6 Cir. 1958), cert. denied 358 U.S. 830, 79 S.Ct. 503. Therefore, when a competi-

The question posed previously should thus be restated to ask: Who will challenge illegal actions of the Comptroller? An examination of the potential challengers confirms the conclusion that a competitor will be the most likely and most vigorous challenger.

Under *Flast v. Cohen* is is doubtful that a taxpayer could challenge Comptroller action. There is involved here "an essentially regulatory statute" which may not be challenged by taxpayers as such.

It is unlikely that a bank depositor or customer would attack the actions involved in this case. "The intended beneficiaries of the banking laws, if the class is narrower than the public, are bank customers who have no immediate and compelling interest in litigation to further long-term sound banking." *Investment Co. Institute v. Camp,* CCH Fed. Banking L. Rep. 80,166 (Bazelon, J., concurring).

Conceivably, a bank shareholder could challenge the questioned actions. But such a challenge has not yet appeared and would be of questionable validity. A shareholder, unlike a competitor, would have extreme difficulty in showing any actual injury. See *Ashwander v. TVA,* 297 U.S. 288 (1936). Certainly, when the injury to a competitor is compared to the injury to a bank shareholder, the competitor's interest is more direct and substantial. It is reasonable to believe that such a lawsuit would be more likely "pursued with the necessary vigor" by a competitor than a shareholder. In any event the possibility that a shareholder might challenge the action here questioned should not bar the present lawsuit.[9]

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tor believes he is being subjected to illegal competition owing to impropriety by the Comptroller, the courts should be open to hear and decide the alleged wrong." (p. 388.)

[9] "However, if, as we conclude, there are circumstances under which a taxpayer will be a proper and appropriate party to seek judicial review of federal statutes, the taxpayer's access to federal courts should not be barred because there might be at large in society a hypothetical plaintiff who might possibly bring such a suit." *Flast v. Cohen,* 392 U.S. at 98, n. 17.

Professor Louis Jaffe has analyzed the law of standing in terms of "public actions" and "private actions." *Jaffe* 459-545. In a "public" action, the party seeking judicial review of administrative action would not be required to show a personal interest in the litigation; standing would be grounded in the public interest in judicial review of certain aspects of governmental action. In the "private" action, the standing of the claimant is grounded in a "distinctive or discriminating impact which specially entitles him to challenge an allegedly illegal administrative action." *Jaffe* 501. See also Harlan, J., dissenting in *Flast v. Cohen*, 392 U.S. at 116. Regardless of the sharpness of the distinction between the two types of actions, it is apparent that they merge in a unique manner in the present case. The inescapable fact that the competitor here has suffered actual harm gives him the "personal stake" that this Court required in *Flast v. Cohen*, and, indeed, a stake that goes far beyond the interest of the plaintiffs in that suit; this financial interest makes the competitor the logical and probably the only person willing and able to assert the acknowledged vital public interest in the proper functioning of the national banking system.[10]

The decided cases in this field have borne out the preceding contentions. In all these cases it has been a competitor

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[10]This Court has not been unaware of strong motivation supplied by injury to financial interests in redressing public rights. In commenting on the standing of a book publisher to bring action against a State Commission which attempted to dissuade third parties from distributing the publisher's books, the Court stated as follows:

"Finally, pragmatic considerations argue strongly for the standing of publishers in cases such as the present one. The distributor who is prevented from selling a few titles is not likely to sustain sufficient economic injury to induce him to seek judicial vindication of his rights. The publisher has the greater economic stake, because suppression of a particular book prevents him from recouping his investment in publishing it. Unless he is permitted to sue, infringements of freedom of the press may too often go unremedied." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65, n. 6 (1963).

who has shouldered the considerable burden of litigation. The results in those cases where the barrier of standing was surmounted have been of substantial public benefit. In two of the three cases where the courts of appeals have reached the merits it was decided that the banks were prohibited from engaging in the particular activity in question. *Saxon v. Georgia Ass'n of Ind. Ins. Agents, Inc.*, 399 F.2d 1010 (5th Cir. 1968); *Port of New York Authority v. Baker, Watts & Co.*, 392 F.2d 497 (D.C. Cir. 1968). Had the banks and the Comptroller been successful in their efforts to resist inquiry into the merits of these actions, both would presumably still be acting in violation of law.

To summarize, it is beyond dispute that the federal courts have the power, consistent with Article III of the Constitution, to hear petitioners' claims. Both from the standpoint of petitioners, who have suffered material injury, and from the standpoint of the strong public interest in the functioning of the banking system, it is important that the merits of the controversy be determined. Why, then, have the courts been so troubled with problems of standing in this area? What are the reasons for the contradictory results among the various courts which have considered the problem? We submit that these problems have primarily arisen as a result of the lower courts' efforts to apply or distinguish the ruling by this Court in *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118 (1939), that competitors lacked standing to challenge the constitutionality of the legislation establishing the Tennessee Valley Authority. We further submit that, just as this Court in *Flast v. Cohen* recently re-examined the restrictive rules of standing of *taxpayers*, so the Court should similarly undertake a fresh evaluation of these restrictive rules as they relate to *competitors* of national banks.

II.

THE RESTRICTIVE RULES ESTABLISHED IN THE TENNESSEE ELECTRIC POWER CASE CONFLICT WITH THE UNDERLYING POLICY CONSIDERATIONS WHICH SHOULD FRAME AND LIMIT PROPER RULES OF STANDING AND CONSEQUENTLY THESE RESTRICTIVE RULES SHOULD NOT BE EXTENDED TO NEW FIELDS.

In *Tennessee Electric Power*, a number of private power companies brought action to challenge the constitutionality of legislation establishing the TVA. The Court held that these competitors lacked standing in a decision which appears to have been based on two principles of doubtful soundness: (1) a claimant may not challenge governmental action "unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege" (306 U.S. 137-38), and (2) "the damage consequent upon competition, otherwise lawful, is in such circumstances *damnum absque injuria*, and will not support a cause of action or a right to sue." (306 U.S. 140.)

(1) As to the stated requirement of "legal right": This reasoning has been consistently criticized:

> "Such an approach is demonstrably circular: if the plaintiff is given standing to assert his claims, his interest is legally protected; if he is denied standing, his interest is not legally protected." Wright, *Federal Courts* 38 (1963).
>
> "When a legal right of the plaintiff is not at stake, a plaintiff sometimes has standing and sometimes lacks standing. Circular reasoning is very common, for one of the questions asked in order to determine whether a plaintiff has standing is whether the plaintiff has a legal right, but the question whether the plaintiff has a legal right is the final conclusion, for if the plaintiff has standing his interest is a legally-protected interest, and that is what is meant by a legal right." 3 *Davis* 217.

The requirement that a "legal right" be invaded as a condition precedent to a finding that a claimant has standing is valueless as an aid to determining the outcome of close cases. For in close cases the answer to the preliminary question whether a "legal right" has been invaded depends solely on the answer to the ultimate question whether the claimant has standing. Therefore, to determine that a claimant's legal rights have not been invaded is merely to announce the conclusion that the claimant is without standing.

Aside from logical difficulties, the "legal right" theory runs into practical problems. As pointed out by Professor Jaffe, much administrative action does not readily lend itself to classification in "traditional right-duty" terms and therefore the "legal right" requirement to support a challenge to administrative action is not appropriate. *Jaffe* 508.

(2) As to the Court's discussion of "damnum absque injuria": The other reason given in *Tennessee Electric Power* for denying standing is, like the "legal right" requirement, merely a conclusion. Admittedly there are strong policy considerations favoring lawful competition in this country. For this reason, the economic harm to a competitor resulting from competition of this nature is not protected by the law. In effect, there is a privilege to inflict financial harm upon another in the pursuit of one's own legitimate economic interests, and *no one* may object to such conduct. See Carpenter, *Interference With Contract Relations*, 41 Harv. L. Rev. 728, 754-62 (1928).

Granting these premises, it does not at all necessarily follow that the considerations favoring and protecting lawful competitive activities are equally applicable to competitive activities which are prohibited by legislation or Constitution, or that these considerations are not outweighed by other considerations militating in favor of allowing an injured party to object to this type of conduct. Perhaps the Court

in *Tennessee Electric Power* weighed the conflicting considerations; the opinion does not articulate this process if it occurred. To support its conclusion, the Court cited *Railroad Co. v. Ellerman*, 105 U.S. 166 (1882), a case resting upon the "legal right" theory previously discussed.[11]

Perhaps because of the absence of an analysis of the underlying considerations for its conclusion, *Tennessee Electric Power* has been subject to varying interpretations by courts and commentators alike. The case has been thought of as having been grounded in "considerations of separation of powers," [12] as involving "federally financed competition by a new competitor who was *lawfully* authorized to compete," [13] or as based on the "philosophy of *Frothingham v. Mellon* . . . that not just anyone should have standing to assert the invalidity of a federal program." [14] Another surmise was that the Court decided "on the merits but without opinion, that the Constitution does not protect against competition by such a governmental unit as the TVA [footnote omitted] or that the case was for some discretionary reason an unsuitable one in which to pass on the constitutionality of the Tennessee Valley Authority." [15]

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[11] "The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty . . . . The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right." *Railroad Co. v. Ellerman*, 105 U.S. 166, 173-74 (1882).

[12] Bazelon, J., concurring in *Investment Co. Institute v. Camp*, CCH Fed. Banking L. Rep. 80,164.

[13] Elliott, J., in *Georgia Ass'n of Ind. Ins. Agents v. Saxon*, 390 F.2d 1010, 1016 (1968).

[14] Thornberry, J., concurring in *Georgia Ass'n of Ind. Ins. Agents v. Saxon*, 390 F.2d at 1020.

[15] Bickel, *The Supreme Court, 1960 Term, Forward: The Passive Virtues*, 75 Harv. L. Rev. 40, 44 (1961).

Tennessee Electric Power has recently been explained by this Court as denying standing "because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury." *Hardin v. Kentucky Util. Co.*, 390 U.S. 1, 6 (1968). This principle is the converse of the holding of the Court in *Hardin* "that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision." (390 U.S. at 6.)

We agree with the holding in *Hardin* which *granted* standing, but we believe this Court should re-examine the doctrine *denying* standing solely because of the absence of a legislative purpose to protect the competitive interest. The restrictive rule does not necessarily follow from the permissive rule: merely because a court *must grant* standing where the legislature has protected an interest, it is not required that a court *deny* standing where that particular legislative purpose does not appear. The difficulty with a rule making standing dependent on legislative protection is at least threefold:

1. The presence or absence of a legislative purpose to protect a competitive interest has no more than a fortuitous relationship to the actual harm or injury which the claimant may have suffered, or to his "personal stake" in the controversy[16].

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[16] "The interest of a competitor in avoiding increased competition or reducing existing competition should be enough to give him standing to challenge the constitutionality of a statute which directly affects his competitive position, even though the statutory provisions are not in terms aimed at him and do not order him to do, or refrain from doing, anything.

"The competitor's standing should be clear if we look to the very basis of the standing requirement itself. That requirement stems from the recognition that, within the framework of our adversary system, the adjudicatory process is most securely founded when it is exercised under the impact of a real conflict between antagonistic demands. Hence, it follows that the case

2. The presence or absence of a legislative purpose to protect a competitive interest has no more than a fortuitous relationship to the *public* interest involved in requiring compliance with the substance of the legislation.[17]

3. The rule is often difficult to apply. In many instances judges in the lower courts have been unable to agree whether Congress did or did not indicate a design to protect a competitive interest. For example in the *Georgia Ins. Agents* case, 399 F.2d 1010 (5th Cir. 1968), where the majority found such a congressional purpose in Section 92 of the National Bank Act, 39 Stat. 753 (1916), Thornberry, J., concurring, stated "But in evaluating the legislative history of Section 92, I find little evidence of an intent to protect insurance agents from competition." 399 F.2d at 1019.

Whatever the rationale of *Tennessee Electric Power* may be, we believe that case should not be extended to this one. Certainly, where Congress has protected a competitive interest, that interest becomes a "legal right" and *must* be heard under any rule of standing. But even though such legislative protection may be lacking, where there exists (1) a case

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must be one which is, in actual fact, the litigant's own, so that it will be pressed by him to the extent needed to sharpen and illuminate the constitutional issues. If we look to the financial interest of a businessman, whose competitive position is directly affected by a statute aiding his competitor, it is surely unreal to find that such businessman does not have the personal interest required to permit him to seek to have such statute ruled invalid. When he himself is financially harmed by the statute concerned, it is hardly to be feared that he will do less than his utmost in pressing his challenge to the law." 1 Schwartz, *A Commentary on the Constitution of the United States, Part I, The Powers of Government*, 440-41 (1963) (footnotes omitted).

[17]This anomaly was noticed by Judge Bazelon in the *Investment Co. Institute* case (CCH Fed. Banking L. Rep. 80,166-67):

"Thus, under the usual rules of standing, a state bank can enjoin illegal branching by national banks, but there is no party who can sue to enforce the separation between commercial banking and the securities business. Given the relative triviality of the threat to the banking system posed by outlaw branch banks as compared to the menace of illegal securities dealing, this result is too bizarre to have been intended by Congress."

or controversy within the meaning of Article III of the Constitution, (2) substantial injury, in fact, to the claimant, and (3) an important public interest, then the federal courts should be open to challenges of illegal government action. Such cases should be heard unless Congress has declared the administrative action in question to be unreviewable.[18] We believe that rules of standing based on these factors would more nearly accord with the underlying principles giving rise to these rules.

This approach was explicitly adopted in the recent decision in *Investment Co. Institute v. Camp*, No. 21,662, D.C. Cir., July 1, 1969, CCH Fed. Banking L. Rep. ¶95,157, where the court held that an association representing the mutual fund industry had standing to present the claim of illegal competition:

> "Evaluating Appellees' qualifications as prospective litigants on behalf of their own private economic interests and the public's interests, it becomes evident that they are indeed adverse both as respects their actual prosecution of this litigation and in regard to their fundamental challenge to the Comptroller's authority to allow the national banks to engage in this type of securities activity. Their financial interest in these proceedings has been examined in the preceding opinion, and when this is coupled with authoritative prognostications of impending financial harm to their interests if the Comptroller's regulations are allowed to stand [footnote omitted], it is obvious that there exists one cogent qualification of a challenger in the reasonable probability of factual aggrievement sufficient to insure the spirited adverseness necessary to judicial resolutions.
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> "With this element satisfied, on this record the alternative to a grant of Appellees' claim to standing would be to effectively frustrate any challenge to the regulations in question.

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[18]For an example of statutory exclusion see *AFL v. NLRB*, 308 U.S. 401 (1940).

"Because of the factors discussed heretofore I am unable to set aside my grave doubts as to Appellees' standing to institute and maintain these suits. However, in the uncertain state of the law as to standing, there is something to be said on both sides of that question. I therefore resolve my doubts in favor of the Appellees and concur in the result of that portion of the foregoing opinion which holds that the Appellees have standing. I am influenced substantially, as I indicated at the outset, by the need for judicial examination of the important questions raised." *Investment Co. Institute v. Camp*, CCH Federal Banking L. Rep. 80,172-73 (Burger, J., concurring).

"Principles of standing in competitors' suits have operated as rules of thumb to sort out proper plaintiffs and legal issues of competition deemed appropriate for judicial resolution. Both are present here. It is not disputed that the members of the ICI are aggrieved by the Comptroller's ruling . . . . The ICI presents a question of statutory construction to define the boundaries of official authority, a type of question well within the traditional competence of courts of law. It is the only party likely to assert the public interest in observance of the banking laws by the agency responsible for enforcing them. In the exceptional circumstances of this case, I would grant the ICI standing to vindicate the public interest despite the absence of statutory aid to standing." *Investment Co. Institute v. Camp*, CCH Fed. Banking L. Rep. 80,167 (Bazelon, J., concurring).

This approach to questions of standing is not unknown in other jurisdictions. In *Elizabeth Fed. Sav. & Loan Ass'n v. Howell*, 24 N.J. 488, 132 A.2d 779 (1957), the court upheld standing of a savings and loan association to challenge the establishment of a branch office by a competing association. Chief Justice Vanderbilt framed the considerations relevant to standing in the following terms:

"We condition the right to invoke the judicial power, however, by the requirement that there be some interest to be protected beyond a mere abstraction; but yet, in cases involving substantial public interest, the courts

have held that 'but slight private interest, added to and harmonizing with the public interest' is sufficient to give standing. . . . Moreover, this right to seek judicial review of administrative decisions . . . belongs to all persons who are directly affected by and aggrieved as a result of the particular action sought to be brought before the courts for review.

. . . .

"Competing banking institutions may be the only persons with sufficient private interest in harmony with the public concern for the safety of savings and bank deposits to bring the attention of the courts to errors of law in an administrative action granting a license to establish a branch contrary to the standards set by the statute delegating authority to so act. If such banking institutions do not have the necessary standing, who then is there who can or will challenge an administrative decision favorable to the applicant? Without standing in the appellants to invoke the power of judicial review, the Commissioner's action . . ., right or wrong, proper or arbitrary, takes on a conclusive character to the possible great detriment of the people as a whole." (132 A.2d 779, 785-786, 787.)[19]

An English decision involving the writ of certiorari takes the same approach, without, however, even requiring an important public interest. *Rex v. Richmond Confirming Authority* [1921], 90 L.J.K.B. (n.s.) 413, involved standing of a liquor dispenser to challenge the grant of a license to a competitor. In upholding standing, the court stated as follows (Earl of Reading, C.J.):

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[19]A similar decision is *People ex rel. Ayres v. Board of State Auditors*, 42 Mich. 422, 4 N.W. 274 (1880), where, in granting mandamus at the request of a printer to compel state officials to let a printing contract according to statute, the court stated:

"The rule which rejects the intervention of private complainants against public grievances is one of discretion and not of law. There are serious objections against allowing mere interlopers to meddle with the affairs of the state, and it is not usually allowed, unless under circumstances where the public injury, by its refusal, will be serious." (4 N.W. at 279.)

> "The first point turns entirely on the question whether the applicant can be said to be a person aggrieved . . . . The applicant does not, in my opinion, stand in the same category as a member of the public who may be said to have only a general interest in seeing that the law is properly carried out. He had a particular interest in this subject-matter . . . ." (90 L.J.K.B. (n.s.) at 415.)

This Court also has, in the past, gone beyond the rule of *Tennessee Electric Power*. In *Chicago v. Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958), the Court had before it a case testing the validity of an ordinance which purported to bar the Railroad Transfer Service Company from entering into the business of transporting passengers between railroad stations in Chicago. Parmalee, already engaged in that business, had been permitted to intervene in the lower court. This Court requested counsel to consider the following jurisdictional issue (357 U.S. at 82):

> "Whether Parmelee Transportation Co. has standing to seek review here on appeal or by writ of certiorari."

The Court gave the following reasons for its affirmative answer to this question (357 U.S. at 83-84):

> "Parmelee has standing to secure review of the judgment below by appeal. It is enough, for purposes of standing, that we have an actual controversy before us in which Parmalee has a direct and substantial personal interest in the outcome. Undoubtedly it is affected adversely by Transfer's operation. Parmelee contends that this operation is prohibited by a valid city ordinance and asserts the right to be free from unlawful competition. Transfer, on the other hand, suggests that Parmelee has no standing because the city ordinance is invalid and Transfer's operation is lawful. It argues that a party has no right to complain about lawful competition, citing *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, and *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118. We do not regard either of these cases as controlling here. It seems to us that Transfer's argument confuses the merits of the controversy with the

standing of Parmelee to litigate them. Cf. *Bell* v. *Hood*, 327 U.S. 678. Parmelee's standing could hardly depend on whether or not it is eventually held that Transfer can lawfully operate without a certificate of convenience and necessity."

The parallel between that case and the present case is close. In the earlier case, the party seeking standing alleged that an ordinance prohibited another's entry into the field; in the present case, petitioners allege that national banks are prohibited from entry into the data processing service business.[20] In the earlier case, the party entering the field claimed the ordinance was invalid; in this case, the respondents claim that the statute does not prohibit them from entering the field. The nature of the threatened harm is identical: financial injury as a result of competition allegedly prohibited by law. The claimants' "personal interest in the outcome" is also identical. The decision in the present case should be governed by the same considerations which led the Court to grant standing in the earlier case. Personal interest, or harm, in fact, not "legal right," should be the touchstone to standing, particularly where the personal interest merges with a vital public interest in the questions presented.[21]

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[20] As recognized by the First Circuit, "It has long been settled . . . that the enumeration of such powers [in 12 U.S.C. §24(7)] is an effective and strong prohibition of all activities not enumerated and not incidental to banking. See First National Bank of Charlotte v. National Exchange Bank (1875), 92 U.S. 122, 128, 23 L.Ed. 679; National Bank v. Matthews (1878), 98 U.S. 621, 625, 25 L.Ed. 188; Logan County National Bank v. Townsend (1891), 139 U.S. 67, 73, 11 S.Ct. 496, 35 L.Ed. 107." *Wingate Corp. v. Ind. Nat. Bank*, 408 F.2d 1147, 1150 (1969).

[21] "The courts, in holding, as they sometimes do, that someone like a competitor or a consumer has no standing, have lost sight of the overriding need in our system—to make sure that someone shall in fact be able to secure review of administrative action. It is only if this need is satisfied that the principle of administrative legality can truly be enforced. It is in the interest of the community as a whole that illegal agency action be not left untouched. It is for the judiciary to vindicate this interest by ensuring that there are no unnecessary obstacles in the path of those seeking to challenge

III.

PETITIONERS HAVE STANDING BECAUSE CONGRESS, IN ENACTING THE BANK SERVICE CORPORATION ACT, EVINCED A SPECIFIC LEGISLATIVE PURPOSE TO PROTECT THE COMPETITIVE INTEREST OF DATA PROCESSORS AGAINST NATIONAL BANK COMPETITION.

It is firmly settled that if a legislative purpose can be found to protect a competitive interest, the injured competitor has standing to complain of the disregard of the protected interest. *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968). The courts in the Eighth Circuit in this case and the First Circuit in the *Wingate* case agreed on the existence of this rule but differed sharply on its applicability to the identical factual pattern presented in the two cases. The First Circuit ruled that section 4 of the Bank Service Corporation Act, 76 Stat. 1132 (1962), 12 U.S.C. §1864 (1964), gave standing to data processors, while the Eighth Circuit held in a footnote that the Act was not applicable. An inquiry into the legislative history of the Act demonstrates the validity of the First Circuit's resolution of the question.

In 1962, Congress passed the Bank Service Corporation Act to enable national banks to join together in common ownership of subsidiary corporations established to perform data processing and clerical services for banks. At that time, it was felt that the banking laws prohibited banks from acquiring ownership of subsidiary service organizations. The purpose of the 1962 statute was stated in the following terms:

> "The purpose of H.R. 8874 is to help small and medium-sized banks compete more effectively with larger banks and give better service to the public, by forming bank service corporations which will make available

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the legality of administrative action. To construe the standing requirement as our courts sometimes do is to place an unnecessary obstruction on the road of justice." 9 Administrative Law Bulletin 122, Bernard Schwartz, Editor (1957).

efficient and expensive equipment the banks individually could not afford to buy." 108 *Cong. Rec.* 22029 (1962). (Statement by Senator Robertson, Chairman of Senate Banking and Currency Committee.)

The law originated in the House of Representatives, H.R. 8874, 87th Cong., 2d Sess. (1962). As introduced, Section 4 of the bill read as follows:

> "Sec. 4. No bank service corporation may engage in any revenue-producing activity other than the performance of bank services for banks and, to an extent not exceeding one-half of its total activity, the performance of similar services for persons or organizations other than banks." 108 *Cong. Rec.* 16503 (1962).

This provision created serious questions in the House regarding its effect on competitors such as petitioners:

> "Mr. Roosevelt. . . . May I just add, sir, a point which somewhat worries me. There are, in California, and I assume there may be in the gentleman's State and also in other States, many businesses which might be called data processing concerns which have arisen in recent years and which seek to perform many of the services this bill is directly aimed at.
>
> "What worries me is not that the banks could collaborate together to perform these services, but that they could also compete with outside private concerns doing the same type of processing. Would this not be unfair to a rising new industry? Such competition could come not only from a combination of smaller banks, but from the larger independents as well." 108 *Cong. Rec.* 16501 (1962).

Congressman Reuss replied to Congressman Roosevelt's expression of concern:

> "Mr. Reuss. Further on the point raised by the gentleman from California I would call his attention to the fact that a big bank which has its own data processing equipment is now able, without limitation, to go into the business of furnishing these services; *so really this makes the situation referred to by the gentleman from California better rather than worse.*

"Mr. Roosevelt. The gentleman from Wisconsin is telling me a bank like the Bank of America can, through a subsidiary corporation, provide these services for itself, then get into competition with other businesses?

"Mr. Reuss. Not through subsidiary corporations. There is a limitation.

"Mr. Roosevelt. As part of the banking service to outside people?

"Mr. Reuss. That is correct. *This limitation improves the situation.*" 108 *Cong. Rec.* 16501 (1962). (Emphasis supplied.)

Those portions of Congressman Reuss' statements printed here in italics make sense only as they clearly imply that Mr. Reuss, a member of the Banking and Currency Committee, believed that the Bank Service Corporation Act restricted *banks,* as well as bank service corporations, from performing data processing services. It must be remembered that the existence of bank service corporations was not permitted at all prior to the 1962 law. So there could have been *no* competition by bank service corporations at the time Mr. Reuss spoke. Thus, when he stated that the 1962 Act would make the situation "better rather than worse" he was obviously referring to a limitation on *bank* activities. When he stated that the limitation in the 1962 Act "improves the situation" he could only have been referring to the existing situation relating to banks. The context of his remarks compels this interpretation. Thus, he must have meant that the 50 percent limitation on services for non-bank businesses at least by implication restricted banks as well as their subsidiary service corporations.

H.R. 8874 as passed by the House contained the provision permitting bank service corporations to perform up to one-half of their services for non-bank customers. Certain Senators on the Banking and Currency Committee expressed grave doubts that this restriction was adequate:

"Section 4 of the bill permits a bank service corporation to perform up to one-half of its services for persons other than banks. In effect, this will enable banks to engage in a nonbanking activity—that of offering computer services and related activities. For many banks this may become a substantial and important business enterprise.

"Generally, banks have been prohibited from carrying on any business other than that of banking. This prohibition, which has been an accepted tradition throughout the banking industry, is grounded upon the conviction that banking is a quasi-public industry. Therefore, the chartering of banks has been subject to Government approval, and the continuing solvency of banks has been zealously guarded by the chartering authority. One of the principal means of guarding that solvency has been by limiting the activities, investment or otherwise, in which banks can engage.

"The purpose of this bill is to exempt from such limitation investment in a bank service corporation. To that we do not object, for we believe that this can and will serve a useful purpose. *However, adequate justification has not been demonstrated for extending this exemption to permit banks to engage in the business of data processing, which this bill permits up to 50 percent of the total activity of a bank service corporation." S. Rep. No. 2105,* 87th Cong., 2d Sess. 10 (1962) (supplemental views of Senators Proxmire, Douglas and Neuberger; emphasis supplied).

Representative Reuss had been of the opinion that prior to the 1962 Act banks *had been allowed* to engage in the data processing business, but that the 1962 Act restricted banks from these activities. The material last quoted indicates that Senators Proxmire, Douglas and Neuberger apparently believed that prior to the 1962 Act, banks *could not lawfully engage* in the data processing business, but that the House version of the 1962 Act allowed banks to enter this business. It does not matter for this case which view was correct (or if either was correct); *the crucial point is that key legislators*

believed that the 1962 Act had operative effects on banks as well as service corporations.[22]

This aspect of the present case involves an attempt to determine whether Congress evinced a legislative purpose to protect data processors from bank competition. Whatever the merits of various congressional views of the substantive law relating to bank power to engage in the data processing business prior to 1962, it is indisputable that a considerable number of legislators, all on Banking Committees, were of the opinion that they were affecting *bank* activities in enacting the 1962 law. So if it should appear that in 1962 Congress intended to protect data processors at all, there is no escape from the conclusion that Congress meant its protection to extend to competition from banks.

There simply can be no doubt that Section 4 of the 1962 Act, as finally passed, was designed to protect data proc-

---

[22] "With reference to the prohibition contained in 12 U.S.C. 1864, directed at nonbanking activities on the part of bank service corporations, the following excerpt from the Senate committee report is relevant: *'The bill is not intended as a means to engage in nonbank business, and the committee looks to the bank supervisory agencies* [12 U.S.C. 1865] *to make sure that banks do not organize service corporations for the purpose of entering into businesses other than banking'* (op. cit., p. 4). [Emphasis supplied.]"

"For a national bank to engage directly in the nonbanking activities sanctioned by the regulation manifestly would be at variance with the intent of Congress as expressed in this quoted statement, but it seems reasonable to conclude that the committee was of the opinion that national banks already were prohibited by the term of 12 U.S.C. 24 (Seventh) from embarking upon undertakings not incidental to, or necessary for, the carrying on of the business of banking; and, accordingly, that the restriction contained in 12 U.S.C. 1864 was essential only to prevent indirect evasion of Section 24 through engagement in nonbanking activities on the part of bank service corporations, the agents of the principal. It is inconceivable that the Congress intended to exclude the agent, but not the principal, from engaging in these forbidden activities. As indicated, the failure to include the principal within the express prohibition is understandable only upon the assumption that the Congress was convinced that the principals already had been restricted under previously enacted laws." *Hearings on H.R. 112, 117, and 10529, Before the Subcommittee on Bank Supervision and Insurance of the House Committee on Banking and Currency*, 89th Cong., 2d Sess. 28 (1966) (views of House Committee Staff).

essors. As prevously noted, Senator Proxmire was dissatisfied wth the provisions of the bill allowing up to one-half of service corporation business to be for non-bank customers. He decided to close the door by eliminating the offending clause:

> "Generally, banks have been prohibited from carrying on any business other than banking. Our Federal laws have been careful to restrict them.
>
> . . . .
>
> "This is particularly true because banks have customer lists, and they could offer their customers, for instance, the service of handling their receivables, *which would give the banks a substantial advantage over other legitimate, long established business providing this kind of service.*
>
> "A number of these businesses have informed me and other Senators that *this kind of competition would be very unfair. It would be unfair because the bank could use their own personnel, charge merely the out-of-pocket cost, and the unfair competition could drive businesses now offering this kind of service to the wall.*
>
> *"Those are the reasons why I have offered the amendment.* My amendment would confine these bank service corporations exclusively to servicing themselves and other banks. . . .
>
> "With the adoption of the amendment, I think we are in a position to have a bill that provides what the banks really want, and what the members of the committee feel is justified, and *at the same time safeguard legitimate business enterprises which otherwise might be put out of business."* 108 *Cong. Rec.* 22031 (1962) (remarks of Senator Proxmire; emphasis added.)[23]

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[23]Another expression of congressional intent was as follows: "I join with the Senator in supporting the bill. I think the Senator's amendment is well taken. I think it is advisable to try this situation out at the bank level before we authorize banks to go into competition with other service organizations in providing the type of service contemplated here." 108 *Cong. Rec.* 22031 (1962) (remarks of Senator Bush).

Congress adopted the Proxmire amendment:

> "After much thought, the sponsors of the bill have agreed to accept an amendment to the bill, Senator Proxmire's 9-21-62D, which would limit the activities of bank service corporations to the performance of services for banks." 108 *Cong. Rec.* 22029 (1962) (Statement of Senator Robertson.)

Section 4 of the Act now reads:

> "No bank service corporation may engage in any activity other than the performance of bank services for banks."

The foregoing review of the legislative history of Section 4 of the Act demonstrates a clear congressional purpose to protect data processors from bank competition. Respondents argue, however, that if this Act gives any protection at all, it protects only against competition by bank service corporations and that this protection cannot be extended to give standing to assert illegal competition by banks themselves. But there are overwhelming difficulties with this argument.

First, the legislative history recited above strongly indicates that many legislators were of the opinion that the 1962 Act would protect data processors against competitive bank activity. Whether they were right or wrong in this opinion is a question relating only to the merits of the litigation, but the purpose to give such protection is clear, and this purpose is enough for standing. Respondents have fallen into the error, pointed out in a prior case, of confusing "the merits of the controversy with the standing . . . to litigate them." *Chicago v. Atchison, T. & S. F. Ry.*, 357 U.S. 77, 83 (1958).

Second, respondents take an unduly restrictive view of the already restrictive rules of standing. Their position is apparently based on language in *Hardin v. Kentucky Util. Co.*, 390 U.S. 1, 5-6 (1968), where the Court stated:

> "This Court has, it is true, repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured

business to question the legality of any aspect of his competitor's operations. *Railroad Co.* v. *Ellerman*, 105 U.S. 166 (1882); *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938); *Tennessee Power Co.* v. *TVA*, 306 U.S. 118 (1939); *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940). But competitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury. In contrast, it has been the rule at least since the *Chicago Junction Case*, 264 U.S. 258 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision. See *Alton R. Co.* v. *United States*, 315 U.S. 15, 19 (1942); *Chicago* v. *Atchison, T. & S.F.R. Co.*, 357 U.S. 77, 83 (1958)."

Assuming for the moment (although we vigorously dispute the assumption) that the 1962 Act can be carved down to the point where it indicates a legislative purpose to protect only against competition by bank subsidiaries, not banks, there is still no authority for denying standing. In none of the cases cited in the *Hardin* opinion where standing was denied did the claimant assert the existence of a statutory or constitutional provision clearly protecting against competition from a source so closely related to the actual source of the competition as to be virtually indistinguishable. Thus, neither the decision nor the opinion in *Hardin* bars the present petitioners; neither *Hardin* nor any cases cited therein involved a situation similar to that presented here.

The Comptroller for purposes of this case has made an effort to isolate banks and bank service corporations in two separate worlds, with no relationship between them. However, he has taken an entirely different position within the banking community. Despite the clear mandate of Section 4 of the Bank Service Corporation Act, the Comptroller has

ruled in effect that bank service corporations can engage in the data processing business. The Comptroller has ruled with respect to bank service corporations that:

> "such corporations may only perform bank services for banks. Bank services, however, as defined in the Act, would include any service which a bank would ordinarily perform for a customer. Accordingly, if a bank undertakes to handle the payroll accounts or the accounts receivable of a customer, a bank service corporation may perform for the bank the service necessary to enable the bank to fulfill its undertaking." *Comptroller's Manual for National Banks,* par. 7399, 3 CCH *Fed. Banking Law Rep.* ¶59,880D.

The Comptroller's ruling appears to be an obvious attempt to circumvent the restrictions of the Bank Service Corporation Act, but that is not important here. It is important, however, to note that the Comptroller takes the position that the service corporation can engage in the data processing business for non-bank customers on the basis that a bank has agreed to perform these services for its customer. This close interrelationship between banks and their service corporations in *furnishing* data processing services should be recognized when considering the extent of the *protection against the furnishing* of these services.

Petitioners find statutory warrant for their position in the judicial review provisions of the Administrative Procedure Act, 80 Stat. 392 (1966), 5 U.S.C. §702 (Supp. II, 1965-66), which reads:

> **"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."** [24]

---

[24]Section 10(a) of the Act originally read as follows:

> "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." 60 Stat. 243 (1946), 5 U.S.C. §1009(a) (1958).

The 1966 changes were not designed to alter the meaning in any way.

A powerful argument can be made that this provision of the Administrative Procedure Act extended the doctrine of *FCC v. Sanders Bros. Radio Station,* 309 U.S. 470 (1940), to all administrative action.[25] However, it is unnecessary to so hold in this case. It is only necessary to find that petitioners were adversely affected or aggrieved by the Comptroller's action "within the meaning *of a relevant statute*" (emphasis supplied). To deny standing in the present case, it must be determined that the Bank Service Corporation Act falls outside the class of laws designated by the term "a relevant statute."[26] In view of the legislative history reviewed previously, it would initially appear unreasonable to assert that the Bank Service Corporation Act is not even "relevant." Further analysis confirms this initial conclusion.

A statute cannot be relevant in the abstract; it must be relevant *to* some other matter or consideration. The matter which the Bank Service Corporation Act must be relevant to is obviously the Comptroller's ruling authorizing banks to engage in the data processing business. The question then becomes one of how closely connected to the Comptroller's ruling the Act must be to be a "relevant" statute.

The legislative history of the Administrative Procedure Act gives no help on this question, as the phrase "within the meaning of any relevant statute" was not elaborated on by the legislators. Professor Jaffe interpreted this provision as limiting standing to actions brought under the particular statute which gives standing to the claimant "or perhaps under closely related statutes." *Jaffe* 530. But the question of *how* closely related still remains.

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[25]See 3 *Davis* 211-213.

[26]As pointed out by the court in *Norwalk Core v. Norwalk Redevelopment Agency,* 395 F.2d 920 (2d Cir. 1968), a "relevant statute" can classify a party as "adversely affected or aggrieved" either explicitly by means of a "persons aggrieved" provision or by implication through a legislative purpose to protect a certain interest. (395 F.2d at 933, n. 26.)

A restrictive interpretation would translate the phrase "a relevant statute" as meaning "the controlling statute" or "the particular statute claimed to have been violated." Such a narrow interpretation might be appropriate when dealing with a criminal statute, but not when construing a remedial law such as the Administrative Procedure Act.[27]

It is not necessary (or perhaps possible) to formulate a general rule establishing for all cases how closely related a statute must be to the matter at issue to be "relevant." All that need be settled in this case is to decide that the Bank Service Corporation Act is "close enough." When the congressional policy to protect data processors under the Bank Service Corporation Act is joined with the congressional policy to provide judicial review as expressed in the Administrative Procedure Act, enough has been shown for standing. Petitioners, after all, are only seeking to reach the merits of the controversy; why should a court strain to avoid hearing the substance of litigation? In close cases, cases in doubt, we submit that doubt should be resolved in favor of proceeding to the merits.[28]

An interpretation such as petitioners here contend for would not, as respondents fear, open the doors to unlimited lawsuits by claimants basing their claims on the theory that *some* statute, somewhere among the laws of the United States, protected them and thus gave them standing. As

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[27]In *Heikkila v. Barber*, 345 U.S. 229, 232 (1953), the Court, in commenting on the Administrative Procedure Act, and the legislative history of the Act pertaining to judicial review, stated as follows:

"The spirit of these statements together with the broadly remedial purposes of the Act counsel a judicial attitude of hospitality towards the claim that §10 greatly expanded the availability of judicial review."

[28]For a sympathetic interpretation in another context of a "party aggrieved" statute, see *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied* 384 U.S. 941 (1966), where the court gave standing to a conservation organization to attack an order of the Federal Power Commission.

Congress has required in the Administrative Procedure Act, the claim would have to be based on a "relevant statute." Such a limitation by no means construes the Act to extend the *Sanders Bros.* doctrine throughout the entire sphere of administrative action.

Although petitioners are not in accord with the opinion expressed in 1946 by the Attorney General that Section 10 "reflects existing law," *S. Doc. No. 248,* 79th Cong., 2d Sess. 310 (1946), the result sought here is not inconsistent with that interpretation. Before 1946 there was no law, statutory or decisional, contrary to petitioners' position that they are protected by a relevant statute. Indeed, there is today no contrary law, save in the Eighth Circuit as a result of this case.

CONCLUSION

Professor Davis has recently deplored efforts by the government to avoid judicial consideration of the merits of lawsuits claiming illegal government action. He requests "*above all, that the system of constant pressure from government lawyers to increase the legal complexities and to close the judicial doors to determinations on the merits should be relaxed.*" Davis, *Discretionary Justice, A Preliminary Inquiry* 159 (1969). He suggests that the executive branch voluntarily waive judicially-created limitations on standing. Petitioners agree that a problem exists but doubt that the system can or should be changed by the executive branch or its attorneys; the system should be changed by the same branch of government which created the "legal complexities." It is for the courts to interpret the restrictive rules of standing so that these rules do not go beyond the reasons for the rules. Such interpretations will not unduly interfere with administrative action. In the long run, administrative agen-

cies can only benefit by reasonable judicial review of their actions.

> "The guarantee of legality by an organ independent of the executive is one of the profoundest, most pervasive premises of our system. Indeed I would venture to say that it is the very condition which makes possible, which makes so acceptable, the wide freedom of our administrative system, and gives it its remarkable vitality and flexibility." *Jaffee* 324.

For the reasons stated, the judgment of the court below should be reversed and the case remanded to the district court with instructions to reinstate the complaint.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 85

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC.,

Petitioners,

vs.

WILLIAM B. CAMP, Comptroller of the Currency of the United States, and AMERICAN NATIONAL BANK AND TRUST COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT AMERICAN NATIONAL BANK AND TRUST COMPANY

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BRIEF FOR RESPONDENT AMERICAN NATIONAL BANK AND TRUST COMPANY

STATUTES INVOLVED

The pertinent Section of the National Bank Act, 12 U.S.C. 24, Seventh, provides in part:

> "Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as

such, and in the name designated in the organization certificate, it shall have power—

* * * * *

"Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. * * *"

Section 4 of the Bank Service Corporation Act of 1962, 12 U.S.C. 1864, provides:

"No Bank service corporation may engage in any activity other than the performance of bank services for banks."

Subsection (c) of the Bank Service Corporation Act of 1962, 12 U.S.C. § 1861, provides:

"(c) The term 'bank service corporation' means a corporation organized to perform bank services for two or more banks, each of which owns part of the capital stock of such corporation, and at least one of which is subject to examination by a Federal supervisory agency."

Subsection (a) of the Bank Service Corporation Act of 1962, 12 U.S.C. § 1862, provides:

"(a) No limitation or prohibition otherwise imposed by any provision of Federal law exclusively relating to banks shall prevent any two or more banks from investing not more than 10 per centum of the paid-in and

unimpaired capital and unimpaired surplus of each of them in a bank service corporation."

Subsection (a) of the Bank Holding Company Act, 12 U.S.C. § 1841, provides:

"(a) 'Bank holding company' means any company (1) that directly or indirectly owns, controls, or holds with power to vote 25 per centum or more of the voting shares of each of two or more banks or of a company that is or becomes a bank holding company by virtue of this chapter or (2) that controls in any manner the election of a majority of the directors of each of two or more banks; and, for the purposes of this chapter, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor company became a bank holding company. Notwithstanding the foregoing, (A) no bank and no company owning or controlling voting shares of a bank shall be a bank holding company by virtue of such bank's ownership or control of shares in a fiduciary capacity, except as provided in paragraphs (2) and (3) of subsection (g) of this section, (B) no company shall be a bank holding company by virtue of its ownership or control of shares acquired by it in connection with its underwriting of securities if such shares are held only for such period of time as will permit the sale thereof on a reasonable basis, and (C) no company formed for the sole purpose of participating in a proxy solicitation shall be a bank holding company by virtue of its control of voting rights of shares acquired in the course of such solicitation."

ARGUMENT

The Court Below Correctly Held the Petitioners Lack Standing to Sue, to Enjoin, a National Bank from Competing in the Data Processing Business and to Challenge the Comptroller of the Currency's Ruling Authorizing National Banks to Compete with Petitioners in Providing Such Services.

In order to avoid as much duplication as possible, Respondent, American National Bank and trust Company, adopts the statement of facts, the brief, and arguments of the Government on behalf of Respondent, Comptroller of the Currency, but would add here some additional comments.

This case involves an interpretation and application of the powers granted national banking associations as set forth in the National Bank Act, 12 U.S.C. § 24, Seventh, authorizing national banks to exercise "such incidental powers as shall be necessary to carry on the business of banking". This language is very similar to a section of the New York Statutes interpreted by the New York Court of Appeals in the case of *Curtis v. Leavitt*, 15 N.Y. 9, 55, 157 (1857). This case at page 55 quotes the incidental powers section of the New York law as follows:

> "Such associations shall have the power to carry on the business of banking by discounting bills & c., by receiving deposits, by buying and selling bullion, coins, and exchange, by loaning money on real and personal estate, *and by exercising such incidental powers as shall be necessary to carry on such business.*" (Emphasis added.)

The New York Court of Appeals on page 157 made this comment:

> "The implied powers exist by virtue of the grant, and sagacity can foresee what implied powers may, in the progress of time, the discovery and perfection of better methods of business, and the ever varying attitude of human relations, be required to give effect to the expressed powers. They are therefore left to implication."

While Petitioner claims the Administrative Procedures Act, 80 Stat. 392 (1966), 5 U.S.C. § 702 (Supp. 11, 1965-1966) is involved, this argument was rejected by the First Circuit Court of Appeals in Wingate Corp. v. Industrial Nat'l Bank, 408 F. 2d 1147, page 1151. Petitions for Certiorari pending Nos. 129 and 225 Oct. T., 1969, as did the District Court in the instant case, 279 F. Supp. 675, (A. 22, 23) and the Petitioner did not argue the application of this Act in the Eighth Circuit Court of Appeals. (See Petitioner's Petition for Writ of Certiorari in this case, page 10.) These authorities, we feel, are ample arguments in and of themselves for the proposition that the Administrative Procedures Act does not apply to the issue standing in the instant case.

The main thrust of the Petitioner's case is their attack on the Comptroller's ruling that,

> "Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers."

(Oct. 15, 1966, ED. par. 3500). Thus, Petitioners would assume the role of an attorney general and would question the supervision and control of national banks and ask the courts

to take over their supervision and control in this particular field of competition.

We conclude from the arguments and authorities contained in the Government's brief that the Petitioners have no standing unless they are within a class of persons to be protected by some statute. In this connection, Petitioners would rely on the Bank Service Corporation Act, 12 U.S.C. § 1864. It is interesting to note that a national bank is not an essential ingredient to a bank service corporation as that Act provides in 12 U.S.C. § 1861(c):

> "* * * A bank service corporation means a corporation organized to perform bank services for two or more banks, each of which own part of the capital stock of such corporation and at least one of which is subject to examination by a Federal supervisory agency."

Thus, this Act was not aimed at just national banks. Notwithstanding Petitioners would claim that Section 4 of the Bank Service Corporation Act, 12 U.S.C. § 1864, was intended to protect them from competition by national banks. This Section 4 appears to be clear and unambiguous:

> "No bank service corporation may engage in any activity other than performance of bank services for banks."

Clearly, this provision applies only to bank service corporations, which, under this law, would have to consist of the combined activities of two or more banks. In spite of the lack of ambiguity, Petitioners would rely on some remarks by some of the legislators in the legislative history of this Act.

We suggest that the total legislative history of the Bank Service Corporation Act, including the specific language of the Act itself, considered with the legislative history of the so-called Antilottery Law, 12 U.S.C. § 339, should lead to the

conclusion that the Bank Service Corporation Act did not restrict the activities of any bank but only the activities of a bank service corporation which, under 12 U.S.C. § 1861(c) and § 1862(a), has to be the creature of two or more banks. Thus, Congress in the Bank Service Corporation Act limited the activities of two or more banks in combination but is silent on the same activities of a single bank. Similarly, the Bank Holding Company Act of 1956, 12 U.S.C. § 1841 and § 1842, requires only multi-bank holding companies to divest themselves of all nonbanking interests. Thus, a single bank holding company might engage in providing data processing services directly or through a subsidiary corporation. We urge that inasmuch as the respondent Bank here is not a bank service corporation, the Bank Service Corporation Act should have no bearing on the issue of standing.

It was a well-known fact that at the time of the hearings on H.R. 8874 (which as amended later became law and is known as the Bank Service Corporation Act), that banks were doing data processing for other banks and business concerns. The opening statement of Chairman Martin of the Federal Reserve Board at the House hearing in July 1962 bears this out:

> "Next, I will offer some observations and suggestions concerning the bill H.R. 8874, which would authorize member banks of the Federal Reserve System to invest in 'bank service corporations'. * *
>
> "The bank service corporations established under the bill would serve as a means whereby banks—and especially small and medium-size banks—and their customers could benefit from the improved efficiency and economies possible today only through automation. * * *

"Notwithstanding the high initial cost of equipment of this kind, some banks—especially the larger banks—are purchasing or leasing this equipment. Other banks are gaining access to this equipment through various contractual arrangements with data processing centers operated by private commercial concerns, and some banks that have purchased or leased this equipment are doing data processing *for other banks and business concerns.*

"Under the bill, two or more banks would be able to pool their resources through the corporate device in order to gain the benefits—for themselves and for their customers—of this expensive equipment. This approach to the problem is not now open to member banks, because they are quite limited by the Federal banking laws as to the stock or securities that they may acquire. Of course, even if this bill is enacted, State member banks will be able to invest in bank service corporations only if authorized to do so by State law, but I understand that at least six States have recently enacted laws that specifically authorize such investments by State banks." (House Hearings on H.R. 8874, 87th Congress, pages 33-34) (Emphasis added.)

Congressman Multer made it clear that the purpose of H.R. 8874 was to enable smaller banks to get access to up-to-date processing equipment and other clerical services and that it was not intended to restrict the rights or powers of banks.

"Mr. Chairman, I would like to make clear that the bill is not intended to go outside of the very language appearing in this bill. It is not intended to interfere with any of the rights banks now have, and as they do presently, to arrange for any of these services to be performed for

them by independent agencies or independent contractors. This will not interfere with any authority now vested in banks by virtue of any of the banking laws of either the State governments or the Federal Government. It merely sets up a new means by which individual banks can acquire these additional services." (108 Cong. Rec. 16500)

On at least one other occasion, Congress was made aware that banks were performing data processing services for customers, and this occasion was in connection with the so-called Antilottery Laws, 12 U.S.C. § 339, et seq. A bill, H.R. 10595, 90th Congress, was introduced which in its original form would have prohibited banks from performing data processing services for lotteries. The Senate made it clear that banks were to be able to continue such services by deleting the prohibition on data processing by banks for lotteries. Thus, Senator McIntyre in a letter to Senator Proxmire, printed at page 21 of the Senate Hearings on H.R. 10595, stated in part:

"* 1 * For example, the Sweepstakes Commission maintains a checking account in a commercial bank. It leases safe deposit facilities. *It has contracted for time on automatic data processing equipment.*

"These relationships with financial institutions are clearly within the right of an agency of a State of the United States. Nevertheless, it is my belief that each of them would be prohibited by the enactment of H.R. 10595. I would hope that the Subcommittee on Financial Institutions would find it possible to amend H.R. 10595 so that State agencies would be permitted to continue making normal use of financial institutions, regardless of the particular responsibilities of those agencies." (Emphasis added.)

On November 6, 1967, about five years after the passage of the Bank Service Corporation Act, Senator Proxmire made the following statement to the Senate committee on banking in connection with the so-called Antilottery Law, H.R. 10595, 90th Congress:

> "In recommending this legislation, the committee approved amendments which permit federally insured banks and savings and loan associations, to engage in *record-keeping activities* and to perform other custodial functions on behalf of the State lottery. Such institutions would be forbidden to sell lottery tickets directly to the public or to advertise or promote the lottery, but they could perform other services such as *record keeping, data processing,* as well as the acceptance of the proceeds of the lottery tickets sales for delivery, payment, or transfer to the State. Banks would also be permitted to distribute lottery tickets to duly authorized sales agents of the State and could make payment to the winners in such lotteries. *Since these are common bank services which are already performed for other bank customers, the committee does not believe it feasible or practical to prohibit banks from performing these same services on behalf of a State lottery.* However, the direct sale of lottery tickets to the general public is not incident to the business of banking and would be prohibited by the bill." Senate Report No. 727, 90th Congress. (Emphasis added.)

Thus, it appears that Senator Proxmire understood clearly that the Bank Service Corporation Act did not prohibit banks (as distinguished from bank service corporations) from performing data processing for its customers. The original proposed Antilottery Law, H.R. 10595, had a specific provision

prohibiting insured banks from performing data processing services for lotteries which incidentally would have been unnecessary as far as national banks are concerned if they were already prohibited by national banking laws from doing so. If Senator Proxmire and other legislators were not convinced that national banks had the power to do data processing services, mere deletion of this prohibition in the proposed anti-lottery legislation would not have given such banks any additional powers. In the light of Senator Proxmire's foregoing statement and his own particular evaluation of the amendments, it wouldn't appear that he originally intended the Bank Service Corporation Act to prohibit national banks from doing data processing for bank customers or, at the very least, he recognized that no such purpose had been accomplished.

By reason of the fact that Congress did not see fit to specifically prohibit banks, as opposed to bank service corporations, from performing data processing services for their customers and the general public at the time of the passage of the Bank Service Corporation Act, and inasmuch as it went out of its way to be sure that banks would not be prohibited from doing data processing work for lotteries by amending the Act as originally proposed, it would appear that Congress has made no effort to protect petitioners as a class, and that they should not be granted any standing. Similarly, Congress, by exempting single bank holding companies from the Bank Holding Company Act, has in effect permitted banks to indirectly engage in any outside activity including data processing for the public.

If standing be granted in the instant case and a decision on the merits ensues, regardless of the outcome, it will be just a beginning of a vast amount of litigation as most every case will differ in determining what is incidental and necessary

to banking. Thus, Petitioners, in their brief, page 15, suggest that the stability and safety of banks and the possibility of serious financial losses from the installation of data processing equipment are pertinent subjects on the issue in this case of standing. We suggest that there are related economic questions. Can national banks survive without data processing equipment? Can national banks compete with those state banks permitted to do data processing for their customers? Can national banks afford to operate expensive computers a few hours a day and only after banking hours when its records are available? Should national banks, if they cannot afford to operate their own computers, be forced to turn over their records, possibly including negotiable items and confidential information of its customers for processing, to some data processing company not subject to the supervision and control of banking authorities or to its competitor in a bank service corporation? It is admitted that the Comptroller of the Currency has been granted by Congress the authority to supervise the banking system. (See page 16 of Petitioner's brief). Yet, Petitioners would urge that competitors, assuming the role of an attorney general in the guise of guardians of the public interest, should have standing to test the Comptroller's interpretation of the laws and his supervision and control of banks through litigation in the courts. Factors such as the capital structure of the bank, the nature and kind of its competition, the economics of large computers versus small computers, the percentage of data processing work done for itself as compared to other customers, the type and kind of data processing such as payroll accounts, accounts receivable, and limitless other evidentiary matters may well be pertinent, thus, to give to every competitor seeking to eliminate competition the right to challenge alleged ultra vires acts of national

banks, would result in the courts taking over in large measure the supervisory powers of the various administrative agencies charged with the duty of regulating and controlling national banking associations.

It is respectfully requested that for all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 85

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., AND DATA SYSTEMS, INC., PETITIONERS

v.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, AND AMERICAN NATIONAL BANK AND TRUST COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE COMPTROLLER OF THE CURRENCY

OPINIONS BELOW

The opinion of the United States District Court for the District of Minnesota (App. 19–29) is reported at 279 F. Supp. 675. The opinion of the United States Court of Appeals for the Eighth Circuit (App. 31–41) is reported at 406 F. 2d 837.

JURISDICTION

The judgment of the court of appeals (App. 42) was entered on February 6, 1969. The petition for a

writ of certiorari was filed on April 10, 1969, and was granted on June 23, 1969 (App. 43). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the allegation that a competitor's activities are prohibited by statute suffices to confer standing to challenge those activities in the absence of any statutory purpose to protect the plaintiff or any other additional aid to standing.

2. Whether, in applying the principle that standing to complain that a competitor's activities are prohibited exists only if the plaintiff is a member of a class intended to be protected by the statute allegedly violated, standing may be rested solely on a subsidiary policy alleged to lie behind a different statute plainly inapplicable to the defendant competitor.

STATUTES INVOLVED

The pertinent Section of the National Bank Act, 12 U.S.C. 24 Seventh, provides in part:

> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—
>
> * * * * *
>
> Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory

> notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; * * * by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. * * *

Section 4 of the Bank Service Corporation Act of 1962, 12 U.S.C. 1864, provides:

> No bank service corporation may engage in any activity other than the performance of bank services for banks.

STATEMENT

Petitioners in this action are the Association of Data Processing Service Organizations, Incorporated (ADAPSO), whose members sell data processing services to the business community, and Data Systems, Incorporated (Data Systems), a member of that Association. They are seeking here to establish standing to challenge a ruling by the respondent Comptroller of the Currency that as an incident to their banking services national banks such as respondent American National Bank and Trust Company (American Bank) may make data processing services available to other banks and bank customers.

Data processing is a growing and increasingly important element of American business life. Because of the volume of data they must handle in their own affairs, banks have been at the forefront in the use of modern data processing equipment. The question soon arose whether national banks, under the "incidental powers" clause of the National Bank Act, 12 U.S.C. 24 Seventh, could in some circumstances make their own surplus data processing facilities available to

other banks and bank customers. Three successive Comptrollers ruled that such activities were proper; the current ruling was set out in the October 15, 1966, revision of the Comptroller's Manual (App. 21):

> Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers. [Para. 3500.]

On June 15, 1967, petitioners brought this action seeking to invalidate this ruling and to enjoin American Bank from performing data processing services pursuant to it. The complaint stated that the action arose under the National Bank Act and that it involved "an interpretation and application of" that Act and a "determination of the powers granted" national banks "under that Act as set forth in 12 U.S. Code § 24" (App. 5). In accordance with this general statement of the nature of the suit, the complaint asserted that the action of the Comptroller and the Bank contravened 12 U.S.C. 24 Seventh (App. 6). No violation of any other statutory provision was claimed.[1]

The complaint also set out the harm which allegedly would result from the Comptroller's ruling (App. 6–8):

* * * * *

[1] The complaint also sought $100,000 in damages from American Bank (App. 9), presumably for tortious interference with contract rights (see App. 7–8). This claim was not mentioned as a basis for standing to attack the Comptroller's ruling in petitioner's brief in the district court, and was referred to only briefly in the court of appeals. It is not relied upon in this Court.

11. * * * [T]he marketing of data processing services by national banks has been growing rapidly, and is anticipated to grow even more rapidly in the future.

* * * * *

16. * * * DATA SYSTEMS has been deprived of the right and opportunity to perform * * * [certain data processing] services [for a potential customer] and to be compensated therefor.

* * * * *

18. * * * By performing said illegal data processing services, and by holding itself out as willing and able to perform such services, AMERICAN BANK has caused and unless enjoined will continue to cause substantial and irreparable harm to DATA SYSTEM's business and to the business of other members of ADAPSO, by depriving them of customers for whom data processing services would be rendered and from whom compensation would be received.

No allegation was made that American Bank or other national banks risked injury to the public interest in preserving the financial stability of banks through engaging in the practices concerned.

Both respondents moved to dismiss the complaint on the ground that these allegations of threatened competitive injury did not give petitioners standing to maintain the action (App. 15, 17). The district court granted the motions to dismiss (App. 18–19), and the court of appeals affirmed (App. 42). The court of appeals concluded, after an exhaustive analysis of the decisions of this Court and of the various courts of appeals, that a competitor may challenge allegedly "illegal" competition only when he can

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show (1) a legal right to be free from competition by reason of a governmental charter; or (2) that specific legislation authorizes him as an "aggrieved person" to sue in the public interest; or (3) that he is a member of a class given express statutory protection against the competition which he seeks to attack. It then found that data processing service companies possess no property right by virtue of franchise or charter to be free from competition, that there is no "person aggrieved" review provision in the National Bank Act, and that it was not a legislative purpose of the Act to confer statutory protection on the competitors of national banks (App. 40–41). Petitioners' argument that such a purpose is reflected in the Bank Service Corporation Act, which permits two or more banks to form a joint subsidiary to perform such "bank services for banks," was held to be "misplaced" (App. 40, n. 12). In these circumstances, the court reasoned, petitioners' claim to standing amounted to (App. 41):

> * * * an attempt merely to show "a common concern for obedience to law." *L. Singer & Sons* v. *Union Pac. R.R.*, 311 U.S. 295, 304 (1940). As pronounced in *Singer*, outside statutory consent, the general or common interest can find protection only in the standing granted to public authorities. Unless a relevant statute provides for a "party in interest" to seek judicial review or unless a complainant possesses a recognized legal interest, he lacks standing to be a "private attorney general" to represent the public interest.

ARGUMENT

INTRODUCTION AND SUMMARY

Petitioners brought this action to challenge the ruling of the Comptroller of the Currency that national banks may perform data processing services for other banks and bank customers. They contend that the performance of such services is not within the purview of the provisions of the National Bank Act, 12 U.S.C. 24 Seventh, authorizing national banks to exercise "such incidental powers as shall be necessary to carry on the business of banking," and complain that the effect of national bank activity in this area will be to provide additional competition to data processing service companies. Petitioners do not contend that the Comptroller is attempting to regulate their own activities in any fashion or that data processing service companies are threatened with any injury other than the increased competition which will be provided by national banks as a result of the Comptroller's ruling.

While the gravamen of petitioners' complaint is thus competitive injury, and competitive injury alone, petitioners do not and could not assert that data processing service companies possess any form of franchise or license which gives them the right to operate exclusively in this field and to prevent others from entering it. The data processing service industry is on the same footing as the vast majority of American manufacturing and service industries, in which free and open competition is not merely permitted but encouraged.

In these circumstances, we submit, the courts below correctly concluded that petitioners lack standing to maintain this suit. This Court's decisions over a period of almost 100 years firmly established that where, as here, there is no special statutory provision for judicial review, a complainant seeking to attack governmental action which does no more than increase competition against him must show that he possesses a legally protected right to be free from that competition. If, as here, no such right is conferred by franchise or license, the plaintiff must be able to demonstrate that the statutory enactment alleged to have been violated was intended for his protection against the competition complained of. Petitioners' complaint alleges only a violation of the "incidental powers" clause of the National Bank Act. Their invocation now of the Administrative Procedure Act and the Bank Service Corporation Act—intended to consolidate prior law and to govern the acts of entirely different banking corporations, respectively—is insufficient to show a congressional judgment that they should be empowered to test the construction of the incidental powers clause in the nation's courts. Since the National Bank Act was not designed for the protection of potential competitors of national banks, they have no standing to challenge the Act's interpretation.

I. Standing To Complain of Competition Made Possible by Governmental Action Is Dependent Upon a Showing of a Legally Protected Right To Be Free From That Competition

The question of standing in a judicial forum to attack competitive activity made possible by governmental action was first thoroughly explored by this Court in *Railroad Co.* v. *Ellerman,* 105 U.S. 166. There the plaintiff was conducting a public wharfing business in New Orleans when the Louisiana legislature passed a resolution authorizing the defendant railroad to engage in a similar business in New Orleans, in competition with him. Plaintiff alleged, first, that engaging in the wharfing business would violate the railroad's charter from the state legislature and was therefore *ultra vires* (105 U.S. at 173); and, second, that the legislative resolution allowing this competition was unconstitutional (*id.* at 170). Since these claims in no way reflected on any right of the plaintiff to be free from competition by another wharfinger, this Court found them insufficient to establish—

> * * * any legal interest which entitles him to enjoin the company from using its wharf as a public wharf beyond the limits of such use, as defined by that construction of the joint resolution. If he has such interest, it can only consist in preventing competition with himself as a wharfinger, which such more extensive use of the railroad property would create. And if the right to assert it exists, it must rest * * * on the allegation merely that such use is beyond the corporate powers of the company. * * * The

> damage is attributable to the competition, and to that alone. ***But the competition is not illegal. It is not unlawful for any one to compete with the company*** [*sic*—should be *appellee*], ***although the*** [*company*] ***may not be authorized to engage in the same business.*** The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty. A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in preventing the usurpation and perversion of its franchises, because it is a trustee of its powers for uses strictly public. ***In these questions the appellee has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him.*** The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. ***If he alleges that the railroad company is acting beyond the warrant of law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights.*** The company is not shown to owe him any duty which it has not performed. [*Id.* at 173–174; emphasis added.]

One has no standing to assert that a competitor, or the government in authorizing competition, is behaving illegally in the abstract. In this Court's more re-

cent language, there must be "a logical nexus between the status asserted [by a plaintiff] and the claim sought to be adjudicated." *Flast* v. *Cohen,* 392 U.S. 83, 102. The plaintiff must establish that the assertedly unlawful grant of authority to the competitor invades some legally protected right, *personal to him,* to be free from the competition. Thus, in *Ellerman,* the railroad's wharfinger activities—even if "beyond the warrant of law"—violated no duty owed to the plaintiff, since the law did not entitle him to create or protect a monopolistic position in the field of enterprise involved.

The teaching of *Ellerman* is still vital. *Tennessee Power Co.* v. *Tennessee Valley Authority,* 306 U.S. 118, 140, n. 11; *Hardin* v. *Kentucky Utilities Co.,* 390 U.S. 1, 5–6. In *Tennessee Power,* various power companies sought to restrain the Tennessee Valley Authority (T.V.A.) from competing with them in the sale of electric power, alleging that the Act allowing this competition was unconstitutional, and that they had "the right to be free from illegal competition." 306 U.S. at 124. This Court reiterated that such allegations were insufficient to confer standing:

> * * * unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege. * * * The pith of the complaint is the Authority's competition. But the appellants realize that competition between natural persons is lawful. * * *
>
> * * * * *

> The appellants further argue that even if invasion of their franchise rights does not give them standing, they may, by suit, challenge the constitutionality of the statutory grant of power the exercise of which results in competition. * * * If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is *ultra vires, that there is a defect in the grant of powers to it,* or that the means of competition were acquired by some violation of the Constitution. The contention is foreclosed by prior decisions that the damage consequent on competition, otherwise unlawful, is in such circumstances *damnum absque injuria,* and will not support a cause of action or a right to sue. [*Id.* at 137–140; emphasis supplied; footnotes omitted.]

In its *Hardin* decision just two Terms ago, this Court specifically approved both *Tennessee Power* and *Ellerman.*[2] *Hardin* was a suit by a private power company seeking to enjoin the T.V.A. from supplying electric power in a certain area in competition with the power company. The complaint alleged that the extension of service into that area would contravene a 1959 amendment to the Tennessee Valley Authority Act which precluded T.V.A. from expanding its sales outside the area for which it was the primary source of power on a specified date.

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[2] We discuss below (p. 30*ff*, *infra*) petitioners' insistence (Br. pp. 20 *et seq.*) that *Tennessee Power* was incorrectly decided and should be reexamined by this Court.

Addressing itself first to the question of the power company's standing to enforce the statutory restriction, this Court pointed out that it had

> * * * repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations. *Railroad Co.* v. *Ellerman,* 105 U.S. 166 (1882); *Alabama Power Co.* v. *Ickes,* 302 U.S. 464 (1938); *Tennessee Power Co.* v. *T.V.A.,* 306 U.S. 118 (1939); *Perkins* v. *Lukens Steel Co.,* 310 U.S. 113 (1940) [390 U.S. at 5–6].

Competitive injury provided no basis for standing in those cases because

> * * * the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury [*id.* at 6].

On the other hand, the Court concluded,

> * * * when the particular statutory provision invoked *does* reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision [*ibid.;* emphasis added].

In the circumstances of *Hardin,* this Court found it "clear and undisputed" from the Act and its legislative history that "one of the primary purposes of the area limitations * * * was to protect private utilities from TVA competition."[3] *Id.* at 6. Thus, "[s]ince

[3] The Court pointed to a committee report and several statements of individual members of both Houses in connection with the 1959 amendment which made it "clear and undis-

[the power company] is * * * in the class which [the enactment] is designed to protect, it has standing under familiar judicial principles to bring this suit * * *." *Id.* at 7.

In sum, under an unbroken line of decisions in this Court, competitor standing cannot be supported simply by the assertion that the defendant's competing activity is illegal in the abstract. Rather, the threatened competition must invade some legally protected interest which the plaintiff itself possesses. Such an interest can stem from either (1) a specifically conferred property right (*e.g.*, in the form of a franchise or license) to be free from the allegedly illegal competitive activity (cf. *Frost* v. *Corporation Commission*, 278 U.S. 515); or (2) a clear legislative intent, underlying the statutory provision claimed to have been violated, to confer protection from competitive injury upon the plaintiff or his class (*Hardin* v. *Kentucky Utilities Co., supra*). But it must be there.

> [T]he concept of standing focuses on the party seeking relief, rather than on the precise nature of the relief sought. * * * The decisions of this Court have also made it clear that something more than an "adversary interest" is necessary to confer standing. There must in addition be some connection between the official action challenged and some legally protected interest of the party challenging that action. See *Flast* v. *Cohen, supra, at* 101–106. [*Jenkins* v. *McKeithen*, 395 U.S. 411, 423.]

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puted that protection of private utilities from TVA competition was almost universally regarded as the primary objective of the limitation." 390 U.S. at 7.

Standing cannot be asserted, as petitioners would have it (Br., pp. 11–12), on simply a strong "adversary" interest.[4]

The courts of appeals have, for the most part, followed this Court's decisions in the area of competitor standing and have refused to find standing absent a statutory aid of some kind. See, *e.g.*, *Pennsylvania Railroad Company* v. *Dillon*, 335 F. 2d 292 (C.A.D.C.), certiorari denied *sub nom. American-Hawaiian S.S. Co.* v. *Dillon*, 379 U.S. 945; *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F. 2d 859 (C.A. 5), certiorari denied, 385 U.S. 815; *Arnold Tours, Inc.* v. *Camp*, 408 F. 2d 1147 (C.A. 1), petition for certiorari pending, No. 128, O.T., 1969; *The Wingate Corp.* v. *Industrial National Bank*, 408 F. 2d 1147 (C.A. 1), petitions for certiorari pending, Nos. 129 and 225, O.T., 1969. But cf. *Saxon* v. *Georgia Ass'n of Independent Insurance Agents, Inc.*, 399 F. 2d 1010 (C.A. 5);[5] *National Ass'n of Securities*

[4] Contrary to petitioners' belief (Br., pp. 28–29), *Chicago* v. *Atchison, T. & S.F. R. Co.*, 357 U.S. 77, is not in conflict with *Tennessee Power*. That case involved a complaining party which had been issued a license to operate its transportation company within the city limits. This, along with the competitive restrictions of a city ordinance, conferred upon it "the right to be free from unlawful competition." 357 U.S. at 83.

[5] In *Georgia Ass'n.* the plaintiff insurance agents were held to have standing to enforce 12 U.S.C. 92, which deals expressly with the subject of insurance activities on the part of national banks. One ground of the decision was that the legislative history of Section 92 manifested a congressional intent to protect insurance agents from competition on the part of national banks (399 F. 2d at 1018). The court also concluded, however, that the plaintiffs' assertion that the competitive activity was illegal (*i.e.*, in violation of Section 92) was in itself sufficient to confer standing (399 F. 2d at 1017). This latter conclusion is plainly inconsistent with the holdings of this Court and, in-

Dealers, Inc. v. *Securities and Exchange Commission* (C.A.D.C., No. 20,164, decided July 1, 1969).[6]

The very recent decision of the Court of Appeals for the Fifth Circuit in *Troutman* v. *Shriver* (Appendix A, *infra*) is illustrative. In *Troutman,* a practicing attorney in Orange County, Florida, and four county bar associations as would-be intervenors, sought to enjoin the institution of legal aid service programs in Orange County and three other Florida counties by the Director of the Office of Economic Opportunity. According to the plaintiff, if that plan were carried out, he would be forced to compete with OEO lawyers for a clientele who could afford to obtain repre-

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deed, was sharply criticized by both the court below in this case (App. 38, n. 10) and the First Circuit in *Arnold Tours, Inc.* v. *Camp, supra.*

[6] In *National Ass'n of Securities Dealers,* members of the mutual fund industry sought to challenge the Comptroller's authorization to a national bank to operate a commingled managing agency account which would compete with mutual funds. The district court held that the plaintiffs had standing and then concluded on the merits that, *inter alia,* the operation of a commingled managing agency account violated penal provisions of the Glass-Steagall Act. The court of appeals reversed on the merits. With respect to standing, the majority of the panel expressed its "reservations amounting to virtual disbelief in" the plaintiffs' standing. While being "unable to set aside [its] grave doubts" in this regard, the majority nevertheless decided to resolve those doubts in favor of standing because of its belief that there was a "need for judicial examination of the important questions raised" (slip op. pp. 46, 47). Presumably, it had in mind the fact that a reversal of the judgment on standing grounds alone would have left unresolved the question as to whether, as the district court had ruled, the bank was engaged in criminal activity. In the circumstances, that case can be fairly regarded as *sui generis.*

sentation by him. He asserted that the Economic Opportunity Act of 1964, as amended, 78 Stat. 508, 42 U.S.C. 2701 *et seq.*, was unconstitutional and that the establishment of the legal aid service programs was in excess of the Director's statutory authority. Without reaching the merits, the district court dismissed the complaint on the ground that neither the attorney nor the bar associations had standing to maintain the action. The Fifth Circuit affirmed.

After rejecting the claims of standing as taxpayers and "as citizens and attorneys," the court in *Troutman* turned to the assertion that the plaintiff and intervenors had standing "because of their position as competitors." The restriction of the practice of law in Florida to those who have been examined and found qualified is, the court held, designed "to protect the public from being advised and represented in legal matters by unqualified persons"—and not "to aid or protect the members of the legal profession either in creating or maintaining a monopoly or closed shop. * * * [T]he decisions of the courts appear to be uniform in denying standing to competitors who otherwise possess no legal right to be free from competition" (*infra,* p. 40). In response to a *Hardin* argument based on a 1967 Amendment to the Act, which the court found from its examination of the legislative history not to have been intended to protect the asserted competitive interests, the court added:

> * * * There are times when competitors are given standing by Congress to challenge competition which allegedly is in violation of a statute where the statute itself is said to be enacted for the express protection of the class

> of competitor complaining. In order to fall within this classification, however, the particular statutory provision invoked must reflect a legislative purpose to protect a competitive interest, *Hardin* v. *Kentucky Util. Co.*, 390 U.S. 1, 5-6, 88 S. Ct. 651, —, 19 L. Ed. 2d 787, 792 (1968). But where, as here, the purpose of the statutory provision is simply to benefit the public at large * * * no right, nor legal standing, is conferred [App., *infra*, p. 43].

This contemporary pronouncement by a court of appeals respecting competitor standing reflects an accurate understanding and application of the governing principles in this sphere. And see also, to the same effect, *South Suburban Safeway Lines* v. *City of Chicago, et al.* (C.A. 7, No. 17,179, decided October 6, 1969), holding that a bus company lacks standing to challenge federal assistance to a competing rail transportation system under the provisions of the Urban Mass Transportation Act of 1964.

II. Data Processing Service Companies Have No Legally Recognized Interest in Freedom From Competition Generally, or From the Competition of National Banks in Particular

Applying these settled principles to the present case, we think it clear that the court below was correct in its conclusion that petitioners lack standing. The Comptroller's ruling that, under the "incidental powers" clause of 12 U.S.C. 24 Seventh, national banks may provide data processing services to other banks and bank customers does not invade any legally

recognized interest of data processing companies to be free from such competition. And there is no other basis upon which petitioners can assert such an interest.

1. It is undisputed that petitioners and their class have not been given, by franchise or otherwise, any general right to restrictions upon those who may engage in data processing activities. Thus, their standing is dependent upon whether, in the words of *Hardin*, "the *particular statutory provision* invoked [reflects] a legislative purpose to protect a competitive interest"; if, but only if, such purpose appears, "the injured competitor has standing to require compliance *with that provision.*" 390 U.S. at 6 [emphasis supplied].

The single statutory provision invoked in petitioners' complaint was 12 U.S.C. 24 Seventh—the "incidental powers" clause of the National Bank Act. It is solely that provision which petitioners claim to be violated by the challenged data processing activities on the part of national banks. Yet, in this Court, as in the courts below, petitioners do not contend that Section 24 Seventh had any purpose—let alone a "primary" purpose such as was found in *Hardin* with respect to the T.V.A. Act—to protect the interest of potential competitors of national banks. The reason is clear: the legislative history of the Section dispels all possible doubt that its enactment in 1864 (13 Stat. 101) was for the express and sole purpose of creating a strong national banking system, initially

to assist in the alleviation of the financial crisis occasioned by the Civil War.[7] To the extent that the protection of a competitive interest was at the bottom of the enactment of Section 24 Seventh, it was the interest of the national banks and not of their competitors.[8]

2. Confronted with this lack of any protective purpose in the only statutory provision invoked in their complaint, petitioners now endeavor (Br., pp. 30–41) to find the requisite statutory aid to standing in the Bank Service Corporation Act of 1962—a statute which does not purport to be directed to the business activities of national banks and which petitioners do not seriously claim itself forbids the activities which they seek to enjoin.

Specifically, they rely on Section 4 of that Act, 12 U.S.C. 1864, which provides that "[n]o bank service corporation may engage in any activity other than the performance of bank services for banks." Although this restriction in terms applies only to a bank service corporation,[9] petitioners maintain that it gives them a

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[7] See Special Message of President Lincoln, Sen. Jour., 37th Cong., 3d Sess., pp. 121–122; Annual Report, Secretary of the Treasury, 38th Cong., 1st Sess., pp. 19–21, reprinted in Federal Banking Laws and Reports (1780–1912), Senate Committee on Banking and Currency, 88th Cong., 1st Sess., pp. 345–347.

[8] See, *e.g.*, *Arnold Tours, Inc.* v. *Camp*, *supra*, 408 F. 2d at 1150–1151; *National Ass'n of Securities Dealers, Inc.* v. *Securities and Exchange Commission*, *supra*, at 16; *National Bank* v. *Matthews*, 98 U.S. 621, 626; 108 Cong. Rec. 22031 (1962) (remarks of Sen. Proxmire).

[9] A "corporation organized to perform bank services for two or more banks, each of which owns part of the capital stock of

legally protected interest in preventing competition by national banks under the National Bank Act. As this Court held in *Hardin,* however, the requisite aid to standing must be found in "the particular statutory provision invoked" on the merits. The reason for the articulation of the rule in these terms is not difficult to perceive. Since the crux of the issue of standing is the status of the plaintiff and not the challenged activity of the defendant, only those persons stating a legally recognized grievance may invoke the power of the courts to invalidate governmental action. *Flast* v. *Cohen, supra,* 392 U.S. at 101–106. A necessary ingredient of a legally recognized grievance is, of course, that the plaintiff has been harmed. It follows that when a plaintiff asserts, as a basis for standing, that a particular statute was intended to protect him or his class from a certain injury, it is incumbent upon him to allege that that injury—and not some other injury to which the statute is not addressed—has occurred.

In the framework of the present case, this means that to invoke Section 4 of the Bank Service Corporation Act as the statutory aid to standing, petitioners must be in a position to allege that that section has been violated and that they have been harmed as a consequence. No such allegation is made, nor is the American Bank a corporation subject to Section 4 or a stockholder of such a corporation. Assuming, then, that Congress has granted a legally recognized interest to petitioners insofar as the restriction in Section 4

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such corporation, and at least one of which is subject to examination by a Federal supervisory agency," 12 U.S.C. 1861(c).

upon the activities of bank service corporations is concerned, that interest has not been jeopardized.

Nor can we agree with the suggestion of the First Circuit in *The Wingate Corp.* v. *Industrial National Bank, supra,* that Section 4 of the Bank Service Corporation Act may in fact "impliedly prohibit national banks from directly entering into the data processing service business," 408 F. 2d at 1153. The legislative history of the Bank Service Corporation Act reflects that both congressional committees were aware that national banks were already providing data processing services of the kind challanged by petitioners. Chairman Martin of the Federal Reserve Board testified before the House Committee that:

> Notwithstanding the high initial cost of equipment of this kind, some banks—especially the larger banks—are purchasing or leasing this equipment. Other banks are gaining access to this equipment through various contractual arrangements with data processing centers operated by private commercial concerns, and *some banks that have purchased or leased this equipment are doing data processing for other banks and business concerns.* [Emphasis supplied.]

Hearings before the House Committee on Banking and Currency on H.R. 8874, 87th Cong., 2d Sess., p. 34. A staff member of the Board provided the same information to the Senate Committee. Hearings before the Senate Committee on Banking and Currency on H.R. 8874, 87th Cong., 2d Sess., p. 64. Yet neither Committee report (H. Rep. No. 2062, 87th Cong., 2d Sess.; S. Rep. No. 2105, 87th Cong., 2d

Sess.) contained any suggestion either that such bank activity was illegal or that it should be proscribed.[10]

The question of the legality of the data processing activities of national banks is, of course, not now before this Court. We submit, however, that this legislative history highlights the unavailability of the Bank Service Corporation Act as a vehicle for asserting a protected right to question that legality. For it is difficult to see how it can be seriously contended that that Act was intended to give petitioners a legal interest in preventing competition on the part of national banks when, with full knowledge of the fact that such competition existed, neither congressional committee addressed itself to the subject at all in reporting out the Act. While it may well be true that national banks and bank service corporations are not wholly unrelated (Pet. Br., p. 37), Congress has clearly manifested its belief that the two

[10] Petitioners quote (Br., pp. 31–32) a colloquy on the floor of the House between Representatives Reuss and Roosevelt, in which the former (a member of the House Committee) specifically acknowledged that banks were then able to furnish data processing services "without limitation". Petitioners' attempt to draw an implication from the colloquy that Mr. Reuss believed that the Bank Service Corporation Act was intended to impose a limitation on national banks as well as bank service corporations. But Mr. Reuss' quoted remarks, taken as a whole, make it clear that he deemed the limitation to which he referred to be applicable only to bank service corporations. Moreover, petitioners do not attempt to explain why, if Mr. Reuss was of the view which they attribute to him, he did not seek to have Section 4 written so as to apply in terms to banks (which he knew were not merely able then to provide data processing services but, in fact, were doing so).

are not the same thing and, accordingly, has dealt with them in different statutes containing different provisions. Whether that fact was the product of compromise or policy determinations, its existence cannot be ignored. In determining standing, therefore, the courts below properly looked only to the National Bank Act, and not to the Bank Service Corporation Act.[11]

3. Petitioners contend in this Court for the first time (Br., pp. 39–41) that the judicial review provisions of Section 10(a) of the Administrative Procedure Act, 5 U.S.C. (Supp. IV) 702(a), provide a basis for standing. Numerous courts of appeals have considered the question as to whether Section 10(a) was intended to alter accepted concepts of standing and have uniformly concluded that it did not eliminate the requirement that plaintiffs establish a congressional purpose underlying the allegedly violated statutory provisions "to bestow upon them a legal right to protection from [the complained of] competition," *Pennsylvania Railroad Company* v. *Dillon,* 335 F. 2d

[11] For present purposes we have assumed that petitioners are correct in their assertion that a primary purpose of the Bank Service Corporation Act was to protect some kind of competitive interest of data processing service companies. We note, however, that the only support that they offer for this assertion is the statement of a single Senator on the floor of the Senate (Br., p. 35). Such a statement is highly suspect as evidence of the intention of Congress as a whole. See *Duplex* v. *Deering*, 254 U.S. 443, 474–475. At the very least, it falls far short of the legislative history which persuaded this Court that a primary purpose of the statutory enactment in *Hardin* v. *Kentucky Utilities* was to protect a competitive interest. See p. 13 and n. 3, *supra*. This Court need not, however, reach this point.

292, 295 (C.A.D.C.), certiorari denied *sub nom. American-Hawaiian S.S. Co.* v. *Dillon,* 379 U.S. 945; *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924, 932 (C.A.D.C.), certiorari denied, 350 U.S. 884; *Braude* v. *Wirtz,* 350 F. 2d 702, 707–708 (C.A. 9); *Arnold Tours, Inc.* v. *Camp, supra,* 408 F. 2d at 1151. See also Jaffe, *Judicial Control of Administrative Action* (1965) 528–531. Nor can it be said that, for the purposes of this action, the Bank Service Corporation Act is a "relevant statute" within the meaning of Section 10(a); for the reasons we have given, that Act simply does not apply at all. This being so, petitioners are not "adversely affected or aggrieved by agency action within the meaning of a relevant statute."

III. There Is No Sound Reason Why This Court Should Overturn Its Consistent Holdings That Standing Is Dependent Upon the Assertion of a Legally Protected Right

Apparently conceding the difficulties they face if this Court adheres to the settled principle that a plaintiff claiming standing must show a "logical nexus" between his status—*i.e.,* legal posture—and the legal questions he seeks to have resolved, petitioners seek to induce this Court to repudiate that principle, chiefly by an assault on *Tennessee Power, supra.* Of course, that case was only one of the many to recognize the principle. While criticism of the principle has not been lacking from those who would prefer a standard of "aggrievement in fact," notably Professor Davis, few if any courts have consciously departed from it.

See pp. 15–16, *supra*. We submit that there is no sound reason now to do so.

1. The "legal right" test, most strongly stated in *Tennessee Power,* is not circular, as petitioners contend, but embodies important governmental policies independent of the legality of the acts ultimately in question. The established test draws a clear and valid distinction between a *plaintiff's* legal interests, which determine standing, and the issue of the legality of a *defendant's* acts, which is pertinent only if the merits are reached. For a variety of reasons, the law could permissibly make the judgment that the legality *vel non* of certain types of activity ought to be a matter of indifference to one or another class of persons. This may be in order to promote the overall efficiency of the judicial system by some reduction of the opportunities for litigation, to avoid undue interference with the operations of government, to assure proper presentation, or, in the case of competitor standing, to aid a general social policy in favor of competition in economic affairs. Allowing established enterprises to oppose the entry of new competitors on the ground that they "have no right" tends to inhibit entry, and with it competition. It is not, then, circular to make the judgment, in the context of a society generally dedicated to the encouragement of competition in economic affairs, that businessmen should not be free to interfere with prospective competitors in the absence of a rather specific legislative determination that there are potential injuries from which they need protection. Jaffe, *op. cit. supra,* 509–510; see also *Marine Space*

Enclosures v. *Federal Maritime Commission*, C.A.D.C., No. 22,936, July 30, 1969, slip op., pp. 20–21. Such is precisely the reasoning of *Ellerman*, *Tennessee Power*, and *Hardin*.

2. It is highly relevant, in a system where the "legal right" test has been the firmly established standard for many years, that Congress has known how to make exceptions when it concludes that public policy requires the conferring of a right to review upon those who can claim only an "aggrievement in fact." See, *e.g.*, Section 9(a) of the Securities Act of 1933, 15 U.S.C. 77i(a) ("person aggrieved"); Section 24(a) of the Public Utility Holding Company Act of 1934, 15 U.S.C. 79x(a) (same); Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b) (same); Section 701(f)(1) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 371(f)(1) (persons "adversely affected"); Section 1(20) of the Interstate Commerce Act, 49 U.S.C. 1(20) ("any party in interest"). That Congress has not enacted such a provision in the National Bank Act is especially pertinent because "the banking field has traditionally been an area of particular congressional concern marked by legislation responsive to new problems." *First Agricultural National Bank of Berkshire County* v. *State Tax Commission*, 392 U.S. 339, 345.[12]

[12] The congressional inaction here cannot be attributed to th absence of a request for such relief. Petitioner ADAPSO itself has testified before Congress concerning the need for review provisions to be written expressly into regulatory statutes of this kind, and the power of Congress to ensure review in this matter. Hearings before the House Committee on Banking and Currency on H.R. 6778, 91st Cong., 1st Sess., pp. 527–528, 560, 570–571.

As the court below observed (App. 36–37), the special "aggrieved persons" review provisions have been enacted by Congress in areas where there has been a "patently recognized need for judicial review even though the competitive business controlled is considered free and otherwise unrestricted"; while one qualifying as a "person aggrieved" may be "without a private 'legal right' to protest unauthorized competition," he nevertheless is given standing by the review provision "to act in the public interest". This analysis is fully supported by this Court's decisions in *Federal Communications Commission* v. *Sanders Radio Station,* 309 U.S. 470, 475–478, and *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U.S. 4, 14–15. See, also, *Office of Communication of United Church of Christ* v. *Federal Communications Commission,* 359 F. 2d 994, 1001–1002 (C.A.D.C.); *Associated Industries* v. *Ickes,* 134 F. 2d 694, 702–704 (C.A. 2), vacated as moot, 320 U.S. 707. But Congress has not considered the regulation of national bank activities an area warranting such creation of private attorneys general.

Indeed even if Congress were interested in deputizing private parties to enforce "the proper functioning of the national banking system" (Pet. Br., p. 18), it would not necessarily choose parties with limited private interests unrecognized by statute, such as petitioners, to do so.[13] As this Court has recognized, such

[13] Without at all conceding that the *amicus* Sierra Club has the standing it asserts in the litigation in which it is presently involved, we note that its situation appears to differ from petitioners' in this regard. For it claims as the basis of standing not a private injury unrelated to the statutory scheme invoked, but a public injury assertedly prohibited by it. Whether Congress

parties are not motivated by the "common concern for obedience to law," *L. Singer & Sons* v. *Union Pac. R. Co.*, 311 U.S. 295, 304, which they profess.

> To entrust the vindication of this public interest to a private litigant professing a special stake in the public interest is to impinge on the responsibility of the public authorities designated by Congress. [*Id.* at 306 (Frankfurter, J., concurring for five members of the Court).]

Congress is of course, under no obligation to create a right, or remedy, for every alleged wrong—even those assertedly perpetrated by public officials. Nor is it appropriate for courts to fashion remedies in Congress' stead—especially where the injury asserted is not of the type historically regarded as appropriate for judicial redress. The remedies which Congress chooses to afford or deny are as significant a part of the statutory structure as the apparent legal framework it creates. If it delegates authority to an agency or official with only limited authority for judicial review, it intends the effects of those limitations as much as any other feature of the scheme. In the absence of constitutional claims, which petitioners do not advance here, there is no greater justification for interference with that feature than with any other.

Adherence to the established rubric of standing, where Congress has not provided otherwise, does not leave remediless those who, like petitioners, can estab-

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may be thought to have authorized "private Attorney Generals," *Associated Industries*, *supra*, 134 F. 2d at 704, to act in these circumstances is a separate issue, not before the Court at this time.

lish only aggrievement in fact. Nor does it leave unprotected the "strong public interest in the functioning of the banking system" (Pet. Br., p. 19) of which petitioners claim to be the only guardians. Underlying much of petitioners' argument is the implicit premise that only the courts are both able and willing to superintend administrative compliance with statutory mandates. But, as the Fifth Circuit pointed out in *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F. 2d 859, 865, certiorari denied, 385 U.S. 815, Congress also is equipped to oversee the administration of its laws and, in fact exercises that function. This observation, made in the context of a complaint regarding non-compliance with the Rural Electrification Act, is applicable *a fortiori* to the Comptroller's administration of the banking laws. For, as this Court has observed, "[t]here are important committees on banking and currency in both Houses which continually monitor banking affairs and propose new legislation when changes are felt to be needed." *First Agricultural National Bank of Berkshire County* v. *State Tax Commission, supra,* 392 U.S. at 341.

What petitioners are endeavoring to do in this action is to enforce a particular Act of Congress. But, as we have shown, Congress has made a choice as to how the public interests reflected in that Act should be protected. By declining to establish a "person aggrieved" judicial review provision, Congress has chosen not to establish persons "aggrieved in fact" as private attorneys general to represent the public inter-

est, and it has not given them any private legal interest in enforcement of the Act. Petitioners' assertion that "aggrievement in fact" should be the sole measure of standing would nullify that choice in this and every other situation where Congress has made it; indeed, all of the specific "person aggrieved" review provisions would become entirely meaningless. This Court should not disregard the choice that Congress has made.

3. Of the countless governmental actions taken daily, many have at least an indirect adverse economic impact upon (*i.e.*, result in "aggrievement in fact" to) some citizens or groups. An across-the-board "aggrievement in fact" standard would vastly expand the role of the courts, effectively tearing down the substantial insulation they have under present general standing rules from intimate involvement in the affairs of government.[14] This effect would be felt even were the courts given some latitude to accept or deny standing on the basis of the degree of significance of the alleged statutory violation or of the seriousness or extent of the aggrievement asserted by the plaintiff. Such facts frequently would not be susceptible of evaluation until after a full trial; there is no reasonably precise formula that could be devised to determine the

[14] Some proponents of the elimination of the "legal right" test of standing have pointed to the relatively few taxpayers suits brought (where authorized) to challenge state and local governmental action. Whether or not attributable in some measure to an inhospitable attitude on the part of state courts to such suits, this provides no basis for forecasting a like experience if an aggrievement in fact test were to be applied to attempts to challenge actions of the federal government.

sufficiency of aggrievement. The result would be to inject an undesirable element of uncertainty and lack of uniformity in the resolution of what is essentially a jurisdictional issue. It would be difficult if not impossible in many instances for a potential plaintiff to make an intelligent judgment in advance of filing suit whether his aggrievement would be found of sufficient consequence to confer standing.

No such problems are inherent in the *Tennesse Power* view of standing, as amplified in *Hardin*. Unless the aggrieved person can show the invasion of a personal legal interest, judicial intervention is required only if Congress has manifested a determination that there is involved an important public interest which can be best safeguarded by making judicial review available. And since there are relatively few statutes containing "person aggrieved" review provisions, the problems of evaluating aggrievement arise relatively seldom and in well-defined areas. To be sure, in the larger number of situations governed by the general rule there may from time to time be room for legitimate difference of opinion as to whether the plaintiff has a legally protected right. But the standards which this Court has evolved are clear, simple, and comparatively easy of application. In general, there is no concrete evidence that, in the utilization of the "legal right" test over the years, the courts have encountered in any substantial measure the difficulties which petitioners claim exist in that test.

In sum, we respectfully submit that this Court should once again reaffirm—not depart from—the rule of *Ellerman, Tennessee Power* and *Hardin*. That rule is founded upon the fundamental proposition that, in our form of government, the function of the judicial branch is essentially that of a guardian of *legal* rights and interests—as well as the additional recognition that a person has no legal right to prevent competition unless and to the extent that the legislature has chosen to confer that right. These propositions are just as valid today as they were when enunciated in *Ellerman*. And their observance is just as essential to the proper working of all three branches of government.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the court of appeals should be affirmed.

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OCTOBER 1969.

APPENDIX

In the United States Court of Appeals for the Fifth Circuit

No. 25539

RUSSELL TROUTMAN, ET AL., APPELLANTS

v.

SARGENT SHRIVER, DIRECTOR, OFFICE OF ECONOMIC OPPORTUNITY, AND UNITED STATES OF AMERICA, APPELLEES

Appeals from the United States District Court for the Middle District of Florida

September 30, 1969

Before: THORNBERRY and SIMPSON, Circuit Judges, and SUTTLE, District Judge.

SIMPSON, Circuit Judge: The determinative issue in this appeal is whether the appellants, as four county bar associations and a taxpayer-citizen-attorney, have standing to challenge the constitutionality of the Economic Opportunity Act of 1964, as amended, 78 Stat. 508, 42 U.S.C.A. § 2701 *et seq.*, or alleged acts or omissions of the Director of the Office of Economic Opportunity regarding the establishment of legal aid service programs in their counties pursuant to the Act.

Appellant Russell Troutman by an amended complaint of January 10, 1967, alleged that Office of Economic Opportunity Legal Services Programs had been instituted in Dade, Volusia and St. Lucie Counties,

Florida, and that the Director of the Office of Economic Opportunity had plans for imminent institution of an OEO Legal Services Program in Orange County, Florida, where Troutman is a citizen, taxpayer and practicing attorney. The complaint further alleged that if an OEO Legal Services Program were instituted in Orange County, Troutman would be deprived of the privilege and obligation of providing legal services to those who could not otherwise obtain representation and that he would be forced to compete with OEO lawyers for a clientele who could afford to obtain representation by Troutman. The complaint prayed for declaratory and injunctive relief, asserting the invalidity and impropriety of the Economic Opportunity Act and the impropriety and lack of authority of the Director's involvement with the profession of law.

The four local bar associations [1] moved to intervene as plaintiffs in Troutman's suit, charging that the defendants were operating,[2] promoting or prospectively would operate [3] OEO Legal Services Programs in their respective counties. Generally the movants sought relief similar to that demanded by Troutman.

The Court below held that none of the appellants had standing to maintain the action. Without ruling upon the merits or other jurisdictional defenses interposed by the defendants, the district judge dismissed Troutman's amended complaint with prejudice and denied the motions to intervene. This appeal ensued. We affirm.

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[1] The Orange County Bar, Osceola County Bar Association, Seminole County Bar Association, and St. Lucie County Bar Association.

[2] St. Lucie County.

[3] The other three counties.

In order to resolve the question whether appellants have standing to contest the validity and constitutionality of the Act or the actions of the Director, it must be determined whether they are proper persons to request an adjudication of issues raised by such action. "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen,* 1968, 392 U.S. 83, 99, 88 S.Ct. 1942, —, 20 L.Ed. 2d 947, 961. The status asserted by the person whose standing is challenged must be examined to ascertain whether there is a logical nexus between the status asserted and the claim sought to be adjudicated. *Id.* at 102. It is the existence of a logical nexus which ensures that "the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " *Id.* at 99, *quoting Baker v. Carr,* 1962 369 U.S. 186, 204, 82 S.Ct. 691, —, 7 L.Ed. 2d 663, 678.

The first status asserted by the appellants is that of federal taxpayer.

> "The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." *Id.* at 102.
>
> "[I]n *Flast v. Cohen, supra,* * * * the [Supreme] Court set out the requirements which must be met by the taxpayer before he has standing. Essentially they are:
> 1. that he is in fact a taxpayer;
> 2. that the tax dollars are being expended in

the furtherance of specific government business;

3. that there is a substantial expenditure; and
4. that these expenditures exceed the limits imposed by the establishment clause of the first amendment on the taxing and spending powers in Aricle I."

Protestants and Other Americans, etc. v. Watson, D.C. Cir. 1968, 407 F. 2d 1264, 1265 [emphasis omitted].

It is important for our purposes that in *Flast v. Cohen* the majority pointed out that the *Flast* test of taxpayer standing is consistent with the result of the Court's prior decision in *Frothingham v. Mellon*, 1963, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078, which ruled that a federal taxpayer is without standing to challenge the constitutionality of a federal statute. *See Flast v. Cohen, supra* at 104–105. The difference between *Flast* and *Frothingham* was that in the former the taxpayer attacked the statute on the ground of its inconsistency with a specific limitation upon the congressional taxing and spending power: the Establishment Clause of the First Amendment, whereas in the latter the taxpayer's challenge was bottomed upon the general provisions of the Tenth Amendment and the Due Process Clause of the Fifth Amendment. "In essence, Mrs. Frothingham was attempting to assert the States' interest in their legislative perogatives and not a federal taxpayer's interest in being free of taxing and spending in contravention of specific constitutional limitations imposed upon Congress' taxing and spending power." *Flast v. Cohen, supra* at 105.

The appellants have not coupled their attack, as taxpayers, upon the Economic Opportunity Act with any specific limitation upon Congress' taxing and spending power and thus have failed to "establish a nexus be-

tween that status and the precise nature of the constitutional infringement alleged." *Id.* at 102. Therefore they were without standing to challenge the Act. *Frothingham v. Mellon, supra.*[4]

The appellants' further claims of standing as citizens and attorneys must also fail. Exactly as with the status of taxpayer *qua* taxpayer, these claims of status have not been coupled with any assertion of direct injury in violation of specific constitutional limitations. "It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." *Ex parte Levitt,* 1937, 302 U.S. 633, 634, 58 S.Ct. 1, 82 L.Ed. 493. [citations omitted.] See also *Dade-Commonwealth Title Ins. Co. v. North Dade Bar Ass'n,* Fla. 1963, 153 So. 2d 723, 726–27.

Neither do appellants have standing to challenge the Act or the actions of the Director because of their position as competitors, because they do not have the type of interest required to confer standing to challenge the Act in the status of competitors.

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[4] We have not overlooked our decision in Saxon, Comptroller of the Currency, etc. v. Georgia Assn. of Independent Insurance Agents, Inc. et al., 5 Cir. 1968, 399 F.2d 1010. Since that case involved the Comptroller's approval by regulation of competition made expressly unlawful by statute, it is inapposite. As we held there, the insurance agents had a "statutory aid to standing", op. cit. at 1018, in addition to their legal right to protect themselves from unlawful competition. There was thus presented in that case a dispute in the necessary concrete adversary context. *Flast*, supra. See the further explication in Judge Thornberry's specially concurring opinion in *Saxon*, op. cit. at 1019–1021.

In Florida, attorneys enjoy no protections from competition by those qualified to engage in legal services. Restricting the practice of law to those who have been examined and found qualified "is not done to aid or protect the members of the legal profession either in creating or maintaining a monopoly or closed shop. It is done to protect the public from being advised and represented in legal matters by unqualified persons * * *." *State ex rel. The Florida Bar v. Sperry,* Fla. 1962, 140 So. 2d 587, 595, *rev'd on other grounds,* 1963, 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed., 2d 428.

The decisions of the courts appear to be uniform in denying standing to competitors who otherwise possess no legal right to be free from competition. See *Tennessee Power Co. v. T.V.A.,* 306 U.S. 118, 137, 59 S.Ct. 423, —, 83 L.Ed. 543, 549 (1939); *Rural Electrification Admin. v. Central La. Elec. Co.,* 5 Cir. 1966, 354 F. 2d 859, cert. denied 358 U.S. 815, 87 S.Ct. 34, 17 L.Ed. 2d 54 (1966). These appellants lack such a legal right and hence lack standing.

The recent 8th Circuit case of *Association of Data Processing Service Organizations, Inc. v. Camp,* 8 Cir. 1969, 406 F. 2d 837, cert. granted 395 U.S. 976, — S.Ct. —, 23 L.Ed. 2d 764 (June 23, 1969), sets forth a clear summation of the holdings of prior cases as to the legal interest required for standing to sue as a competitor:

> "In summary, a plaintiff may challenge alleged illegal competition when as complainant it pursues (1) a legal interest by reason of public charter or contract, Frost v. Corporation Comm'n, supra, (2) a legal interest by reason of statutory protection, Baker, Watts & Co. v. Saxon, supra, or (3) a 'public interest' in which

> Congress has recognized the need for review of administrative action and plaintiff is significantly involved to have standing to represent the public, FCC v. Sanders Bros. Radio Station, supra. From this analysis, it seems clear that an allegation of 'illegal competition' is not the balancing determinant of a plaintiff's standing. The primary search must rest on whether the plaintiff's status is one which enjoys a private interest entitled to protection or is one which the law recognizes to be of such legal significance to allow a party to act as a public representative for a public interest."

Appellants earnestly argue that the Act itself confers standing upon them by virtue of the "Ichord Amendment," section 222(a)(3) of the Act, 42 U.S.C.A. § 2809(a)(3).[5] It is urged that, while the amendment does not expressly confer standing upon attorneys or bar associations as "aggrieved persons," *see, e.g., Scripps-Howard Radio, Inc. v. F.C.C.*, 1942, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229; *F.C.C. v. Sanders Bros. Radio Station*, 1940, 309 U.S. 470, 60 S.Ct. 693, 84 L.Ed. 869; it created a right of local bar associations to be consulted prior to approval or funding of legal services programs and by implication confers

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[5] The Ichord Amendment reads as follows:

> "The Director shall make arrangements under which the State bar association and the principal local bar associations in the community to be served by any proposed project authorized by this paragraph shall be consulted and afforded an adequate opportunity to submit, to the Director, comments and recommendations on the proposed project before such project is approved or funded, and to submit, to the Director, comments and recommendations on the operations of such project, if approved and funded." 42 U.S.C.A. §2809(a)(3).

standing to contest the Director's actions. We disagree.[6]

The Ichord Amendment as originally passed in 1966 provided that the Director was to consult with the local bar associations, but it was made clear at the time by the sponsor of the amendment that it was not intended to give the local bar associations any form of veto over proposed programs but rather was for the purpose of giving them an opportunity to present suggestions and recommendations as to the proposed programs. *See* 112 Cong. Rec. 24437 (Sept. 29 1966).[7] The provision as originally enacted was amended in 1967 to provide the State bar associations an opportunity to make comments and recommendations regarding proposed projects, but the amendment was explained as being for the purpose of providing more helpful assistance to the Director due to the broader base and typically better staff assistance which State bar associations can provide. See 113 Cong. Rec. No. 154, S13856 (Sept. 28, 1967).[8]

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[6] Appellants contend that the amendment was violated as to Orange and St. Lucie Counties. The pleadings assert that there was an O.E.O. Legal Service chartered and about to start operations in Orange County, while in St. Lucie County the O.E.O. Legal Services Program was already in operation. The O.E.O. was then promoting programs in Osceola and Seminole, the other two counties whose bar associations sought leave to intervene.

[7] Mr. Ichord: "* * * this does not give the local bar associations a veto over the proposed programs but merely gives the various bar associations the opportunity to present suggestions and recommendations thereon." 112 Cong. Rec. 24437 (Sept. 29, 1966).

[8] Senator Cooper explained the 1967 amendment which he introduced, as follows:

> The present language of the bill provides that in assisting in the provision of legal services to the poor, the director shall make arrangements with the principal

We are unpersuaded that the Ichord Amendment confers standing upon appellants because we perceive no legislative purpose in that amendment to protect a competitive interest of appellants. There are times when competitors are given standing by Congress to challenge competition which allegedly is in violation of a statute where the statute itself is said to be enacted for the express protection of the class of competitor complaining. In order to fall within this classification, however, the particular statutory provision invoked must reflect a legislative purpose to protect a competitive interest, *Hardin v. Kentucky Util. Co.,* 380 U.S. 1, 5–6, 88 S.Ct. 651, —, 19 L.Ed. 2d 787, 792 (1968). But where, as here the purpose of the statutory provision is simply to benefit the public at large by easing the task of administration of the statute no right, nor legal standing, is conferred.

Appellants' reliance upon *Abbott Laboratories v. Gardner,* 1967, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed. 2d. 681, is misplaced. *Abbott* involved an essentially *regulatory* statute requiring the petitioners to make significant changes in their everyday business practices, *id.* at 154, including the possible destruction of existing property rights, *id.* at 152, or possible criminal sanctions for noncompliance, *id.* at 154. Thus the Government there acted not as a competitor but as a regulator interfering with legally recognized rights. Where legally recognized rights such as the use or enjoyment of property are sought to be protected by im-

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bar associations in the area. My amendment provides that, in addition, they shall seek the advice and comments of the State bar association. I believe that State bar associations are more broadly based, and they usually have a staff which is better able to provide helpful assistance: 113 Cong. Rec. No. 154, S13856 (Sept. 28, 1967).

position of a consultation requirement as a condition precedent to agency action, the individuals affected by agency noncompliance with the condition, or organizations representing their interests, may have standing to contest the action by virtue of the condition. See *Citizens Ass'n v. Simonson,* D.C. Cir. 1968, 403 F. 2d 175. Appellants, however, have demonstrated no legal rights sought to be protected by Congress, there ordinarily being no right to be free from competition and the statute having been passed for the benefit of the public at large.

AFFIRMED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 85

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., and DATA SYSTEMS, INC., *Petitioners,*

v.

WILLIAM B. CAMP, Comptroller of the Currency of the United States, and AMERICAN NATIONAL BANK AND TRUST COMPANY, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief, filed with the written consent of all parties, is submitted in support of the respondents in the above named case on behalf of The American Bankers Association. The Association also filed a brief in support of the petition for writ of certiorari.

QUESTION PRESENTED

Whether a firm engaged in the business of providing data processing services to the public—an unlicensed, unregulated business in which any member of the public can freely engage—has standing under the Bank Service Corporation Act to sue to enjoin a national bank from competing against such firm in said business, on the ground that engaging therein is beyond the powers of national banks under the National Bank Act.

STATEMENT OF THE CASE

This action was commenced by petitioners, a trade association of data processors and a member of that association, against the Comptroller of the Currency as supervisor of the national bank system and against the American National Bank and Trust Company, a national banking association which, incidental to its banking services and pursuant to a ruling of the Comptroller,[1] performs data processing services for other banks and bank customers.

In the courts below, petitioners sought to have the Comptroller's ruling declared unlawful and to enjoin the Comptroller from permitting any national bank to make available its data processing equipment for other banks and bank customers. The complaint of petitioners also sought a declaratory judgment, an injunction and an award of compensatory damages against American National Bank on the ground that its data

[1] The current text of the Ruling (Par. 3500) reads: *Utilization of data processing equipment.* Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers.

processing activities were not incidental to the business of banking and were beyond the powers granted to national banks under the National Bank Act.

Prior to trial, the respondents' motion to dismiss the complaint for lack of standing to sue was granted by the District Court, 279 F. Supp. 675 (D. Minn. 1968), and the Court of Appeals for the Eighth Circuit affirmed, 406 F. 2d 837 (1969).[2]

INTEREST OF AMICUS CURIAE

The American Bankers Association is a trade association having as members approximately 13,600 commercial banks, of which about 4,800 are national banking associations, chartered under and deriving their powers from the National Bank Act, and about 8,800 are State or District banks chartered under and deriving their powers from the laws of the several States and the District of Columbia. According to preliminary reports from an automation survey conducted by the Association in April, 1969, as many as 2,000 of these banks perform data processing services for other banks and bank customers.

The American Bankers Association is interested in this litigation for two reasons:

1) Because an unfavorable decision with respect to automated customer services might impede the development of future automated payments systems based on the use of automated data processing equipment, and might thereby interfere with the ability of the com-

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[2] This decision conflicts with the later decision of the Court of Appeals for the First Circuit in *Wingate Corporation* v. *Industrial National Bank*, 408 F. 2d 1147, petitions for writs of certiorari pending, Nos. 129 and 225, Oct. Term, 1969.

mercial banking system to perform its vital functions for the benefit of business, the government, and the public; and

2) Because a decision that national banks may not engage in automated customer services, when virtually all State banks are permitted to do so, would place national banks at a serious competitive disadvantage with State banks, and might have the most unfortunate results for the dual banking system. *Cf. First National Bank of Logan* v. *Walker Bank and Trust Company*, 385 U.S. 252, 261 (1966).[3]

The American Bankers Association does not propose to consider in this brief the general question of standing to challenge a ruling of a Federal official that a national bank may perform certain functions under the

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[3] In 1967, after the institution of the pending case, the American Bankers Association conducted a survey of State statutes and rulings by State bank supervisors on the subject of automated customer services. In several States, statutes were found specifically authorizing state banks to provide data processing services for their customers. See, for example, Massachusetts Anno. Laws § 48 (15), Mississippi Code § 5224(i), Missouri Anno. Code § 362.105(11), and New Jersey Statutes Annotated 17:9A-25(14). Since 1967 the following states have also enacted similar statutes: Iowa 1969 Laws Division VIII § 804, Ohio Rev. Code Anno. § 1107.34, West Virginia 1969 Laws § 31A-4-37. In many other States, statutes were found authorizing State banks to perform incidental banking services, generally comparable to the corresponding provisions of the National Bank Act. In addition, advice was received from virtually all State bank supervisors to the effect that they had approved the performance of data processing services by State banks under their jurisdiction, under the terms of the applicable State statutes. Copies of several of these letters are set forth in the Appendix to the brief submitted by the Association in support of the petition for writ of certiorari in this case. Additional letters from State bank supervisors in connection with this survey were inserted in the record of the hearings on H. R. 6778, 91st Congress, at pages 588-606.

National Bank Act. This issue is of special concern to, and within the special competence of, the respondents, particularly the Government.

On pages 30 through 41 of their brief, however, petitioners set forth the argument that the Congress, in the Bank Service Corporation Act of 1962, and especially in Section 4 of that Act, has evidenced a legislative purpose to protect the interests of data processing firms against competition by banks which is sufficient to give them standing to maintain this suit. The American Bankers Association was closely involved in the legislative proceedings leading up to the enactment of the Bank Service Corporation Act of 1962, which the Association initiated and supported in order to make it possible for small banks to join together to get the benefits of electronic data processing equipment, and the Association has also followed closely the efforts of petitioner, Association of Data Processing Service Organizations Inc., to bring about the enactment of legislation to prohibit banks from performing data processing services for other banks and bank customers.

The American Bankers Association considers, therefore, that it is in an appropriate position to reply to petitioners' argument that the Bank Service Corporation Act gives them standing to sue.

SUMMARY OF ARGUMENT

The American Bankers Association takes the position that the Bank Service Corporation Act does not provide petitioners with standing to challenge a ruling of the Comptroller of the Currency authorizing national banks to engage in data processing.

The Bank Service Corporation Act and its legislative history make it clear not only that there was no

legislative purpose to protect the interest of data processing firms against competition by banks, but that, on the contrary, there was a legislative purpose not to provide such protection.

The purpose of H.R. 8874, 87th Congress, which became the Bank Service Corporation Act, was to authorize certain Federally regulated banks to hold stock in jointly owned service corporations, and the purpose of Section 4 of the Act was to limit the activities of these service corporations. During the consideration of H.R. 8874 it was repeatedly brought to the attention of the Congress that banks were at that time performing data processing services for other banks and bank customers and in spite of this fact the Congress did not insert in Section 4 or any other part of H.R. 8874 any provision limiting or restricting or prohibiting the performance of data processing services by banks for other banks or bank customers.

Legislative proceedings subsequent to the enactment of the Bank Service Corporation Act reinforce the conclusion that the Congress has evidenced a legislative purpose not to protect data processing firms against competition by banks.

ARGUMENT

I

IN ENACTING THE BANK SERVICE CORPORATION ACT OF 1962, CONGRESS EVIDENCED A LEGISLATIVE PURPOSE NOT TO PROTECT DATA PROCESSING FIRMS AGAINST COMPETITION BY BANKS AND, THEREFORE, THE ACT DOES NOT PROVIDE PETITIONERS WITH STANDING TO COMPLAIN OF A RULING BY THE COMPTROLLER OF THE CURRENCY WHICH AUTHORIZES NATIONAL BANKS TO ENGAGE IN DATA PROCESSING

The Purpose of the Bank Service Corporation Act of 1962 Was To Permit Certain Banks To Invest in Subsidiary Service Corporations

Petitioners contend on page 7 of their brief that "[i]n the Bank Service Corporation Act . . . Congress clearly indicated a legislative purpose to protect data processors against bank competition" and that, consequently, the Bank Service Corporation Act provides petitioners with the requisite statutory standing to complain of a ruling by the Comptroller of the Currency made pursuant to the National Bank Act which authorizes national banks to perform data processing services for other banks and bank customers.

The following excerpts from House and Senate hearings, reports, and Floor debates on H.R. 8874 indicate that the purpose of this bill, which later became the Bank Service Corporation Act of 1962, was to waive the restrictions of certain statutes which prohibited stock ownership by national and other banks and to make it possible for small banks to join together to obtain the benefit of up-to-date data processing equipment for themselves and their customers. The opening statement by Chairman Martin of the Federal Reserve Board at the House hearings on July 19, 1962, makes this clear:

> Next, I will offer some observations and suggestions concerning the bill H.R. 8874, which would

authorize member banks of the Federal Reserve System to invest in "bank service corporations." As set out in its report on H.R. 8874 to your committee, the Board favors the objective of the bill, but suggests some changes in it.

The bank service corporations established under the bill would serve as a means whereby banks—and especially small and medium-size banks—and their customers could benefit from the improved efficiency and economies possible today only through automation. The operations of a bank entail a tremendous volume of data processing, such as the various kinds described in section 2(a) of the bill. At one time much of this was associated with the high desk and quill pen. Today, high speed electronic and related mechanical equipment designed to handle this work is being used by banks with increasing frequency.

Notwithstanding the high initial cost of equipment of this kind, some banks—especially the larger banks—are purchasing or leasing this equipment. Other banks are gaining access to this equipment through various contractual arrangements with data processing centers operated by private commercial concerns, and some banks that have purchased or leased this equipment are doing data processing for other banks and business concerns.

Under the bill, two or more banks would be able to pool their resources through the corporate device in order to gain the benefits—for themselves and for their customers—of this expensive equipment. This approach to the problem is not now open to member banks, because they are quite limited by the Federal banking laws as to the stock or securities that they may acquire. Of course, even if this bill is enacted, State member banks will be able to invest in bank service corporations only if authorized to do so by State law, but I

understand that at least six States have recently enacted laws that specifically authorize such investments by State banks. (House Hearings on H.R. 8874, 87th Congress, pages 33-34.)[4]

The testimony of the Comptroller of the Currency, James J. Saxon, was equally clear.

H.R. 8874 would give authority to member banks and district banks to invest in corporations organized to perform clerical services for them. This reflects a growing need of our banks in this day and age. The introduction of high cost electronic equipment for bookkeeping, sorting, and data processing has imposed a hardship upon the small bank, which can neither afford to continue older, less efficient techniques nor to buy new equipment.

Because of the ever-increasing complexity of banking operations, the needs for modernization will multiply. Enactment of this legislation will enable two or more small banks jointly to own and acquire necessary equipment, which perhaps neither could afford alone. It will thus permit them to compete with the larger banks who have obtained such equipment.

It is of note that the legislatures of Connecticut, Iowa, Maine, Massachusetts, Michigan, Ohio, Pennsylvania, Virginia, and South Carolina have enacted laws which permit State nonmember banks to own stock in service corporations. We have received a considerable number of responses from national banks in connection with the banking survey being undertaken by the advisory committee which I appointed, recommending making

[4] Mr. Frederic Solomon, Director of the Division of Examinations of the Federal Reserve Board, made a similar statement at the Senate hearings (Senate hearings on H. R. 8874, p. 64).

this power available to national banks. (House hearings on H.R. 8874, pages 38-39.)[5]

The House and Senate reports on the bill also indicated that the purpose of the bill was to waive provisions of Federal law prohibiting national banks and State banks from owning corporate stock.

House Report No. 2062—87th Congress

H.R. 8874 would enable banks to utilize modern equipment through stockownership in a jointly owned service corporation. At the present time nine States have enacted legislation specifically authorizing State banks to invest in bank service corporations, and in New York and possibly other States, State banks are authorized to invest in such service corporations under general provisions of the code. However, Federal law prevents national banks and certain other Federally supervised banks from sharing this privilege because of investment restrictions in the applicable Federal statutes.

The bill removes all limitations and prohibitions of Federal law exclusively relating to banks, regardless of how owned, which would otherwise prevent banks from investing up to 10 percent of their capital and surplus in bank service corporations. (House Report No. 2062, page 1.)

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[5] Mr. Jesse P. Walcott, a director of the Federal Deposit Insurance Corporation, made a similar statement during the House hearings (at page 46) as did Mr. Erle Cocke, Chairman of the Federal Deposit Insurance Corporation, and the Comptroller during the Senate hearings on H. R. 8874 (at pages 57-58 & 54). Parallel remarks on behalf of national and State bankers' associations and individual banks were also made throughout the House hearings (House hearings on H. R. 8874, pages 54-62, 73-90) and the Senate hearings (Senate hearings on H. R. 8874, pages 14-20, 74-78, and 92-94).

Senate Report No. 2105—87th Congress

> [S]everal Federal laws prevent national banks and certain other Federally supervised banks from sharing [the privilege of joint ownership of service subsidiaries.] . . . H.R. 8874 would waive (within limits based on capital and surplus) all limitations or prohibitions contained in Federal banking laws on the ownership by two or more banks of stock in a bank service corporation. (pages 1 and 2)
>
> The bill would free from any limitation or prohibition otherwise imposed by any provision of Federal law, exclusively relating to banking (including, for example, 12 U.S.C. 24, 12 U.S.C. 84, 12 U.S.C. 335, and 12 U.S.C. 1845), an investment of not more than 10 percent of the paid-in and unimpaired capital and unimpaired surplus of each of the two or more investing banks. (page 5)

Similar statements were again made on the Floor of the House in connection with the discussion of the rule permitting the consideration of H.R. 8874, (108 Cong. Rec. 16496), and in connection with the consideration of the bill (108 Cong. Rec. 16498).

In addition to this volume of testimony to the effect that H.R. 8874 was introduced for a very limited purpose and surely was not designed to affect the data processing activities of banks undertaken pursuant to some other law,[6] there are further positive statements

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[6] Senator Proxmire himself clearly recognized in his Supplemental Views that no new statute was needed to permit national or State member banks, or insured nonmember banks for that matter, to acquire or get access to data processing equipment:

> Many commercial banks have already purchased data-processing equipment to replace obsolete or less efficient systems. Other banks are now purchasing data-processing services from existing, private data-processing firms. It should be clearly understood that these two methods of utilizing modern accounting and data-processing services are already open to banks (Senate Report No. 2105, page 7).

in the history of this legislation which show a conscious Congressional intention not to become involved in the rights or powers of banks. For example, Congressman Multer, then a senior member of the House Banking and Currency Committee, made these remarks during House debate on the bill:

> Mr. Chairman, I would like to make clear that the bill is not intended to go outside of the very language appearing in this bill. It is not intended to interfere with any of the rights banks now have, and as they do presently, to arrange for any of these services to be performed for them by independent agencies or independent contractors. This will not interfere with any authority now vested in banks by virtue of any of the banking laws of either the State governments or the Federal Government. It merely sets up a new means by which individual banks can acquire these additional services. (108 Cong. Rec. 16500)

The Purpose of Section 4 of the Bank Service Corporation Act Was To Restrict the Activities of Bank Service Corporations; Section 4 Does Not Apply to the Activities of Banks and It Was Not Intended To Protect Anyone From the Activities of Banks

The legislative history of Section 4 of the Bank Service Corporation shows a transition from a very general provision, which not unreasonably gave concern, under which a substantial part—at least 50%—of the activities of a bank service corporation might consist of the performance for industrial and commercial concerns of services completely unrelated to banking or banking functions, to a narrow provision, adopted under pressure in order to prevent the death of the bill at the adjournment of Congress, under which bank service corporations were limited to the performance of bank services for banks. But the legislative

history of the section does not indicate any legislative purpose to do anything except what Section 4 on its face provides—a limitation on the activities of bank service corporations themselves.

H.R. 8874 as originally introduced authorized a national bank or a State member bank to invest in the stock of a bank service corporation, which was defined as:

> a corporation whose primary purpose is to perform for two or more banks, each of which has an investment in such corporation, services such as check and deposit sorting and posting, computation and posting of interest and other credits and charges, preparation and mailing of statements, notices, and similar items, or any other similar clerical or bookkeeping function. (House hearings on H.R. 8874, p. 31.)

The House Banking and Currency Committee rewrote this "primary purpose" provision as Section 4 of the bill as follows:

> *Sec. 4.* No bank service corporation may engage in any revenue-producing activity other than the performance of bank services for banks and, to an extent not exceeding one-half of its total activity, the performance of similar services for persons or organizations other than banks. (Senate hearings on H.R. 8874, pages 9-10.)[7]

In this form, Section 4 was reported by the House Banking and Currency Committee on July 30, 1962 (House Rep. No. 2062, 87th Congress). Congressman Patman and Congressman Gonzalez filed dissenting views, primarily relating to the danger of anticompetitive abuses with respect to banks not belonging to a

[7] A definition of "bank services" following the language of the original bill was inserted in section 1(b) of the Committee bill.

bank service corporation. The bill passed the House on August 14, 1962 (108 Cong. Rec. 16495-16503).

The Senate Banking and Currency Committee began its hearings on H.R. 8874 on August 30, 1962, and thereafter considered amendments to the House bill, including particularly Section 4.

Under the House version of H.R. 8874, a bank service corporation could perform "similar services for persons or organizations other than banks." In other words, under the House bill, a bank service corporation could, up to half its total activity, perform *any* clerical function, *any* bookkeeping function, *any* accounting function, *any* statistical function, or *any similar* function, for *any* person or organization in the world. The House bill did not require that the performance of these functions for nonbanks be limited to those which might be part of the business of banking, or related or incidental to the business of banking.

The minority of the Senate Banking and Currency Committee, therefore, had some reason to take the position that this authorization for bank service corporations to perform "similar services" for persons or organizations other than banks was a very broad provision, and was subject to abuse, and permitted banks to engage in unrelated nonbanking business, which might impair the solvency of banks. (Pages 10-11 of Senate Report No. 2105, 87th Congress.) The majority of the Committee agreed that there was a possibility of abuse, but were concerned that any amendment to the bill might give an opportunity to kill the bill and in any event were persuaded that the bank regulatory agencies could control the situation and prevent abuses. (See Senate Report No. 2105, pages 7-8.) The Committee report warned against abuse of the provision and urged the supervisory agencies to prevent abuses

(page 3), urged that bank service corporations limit their nonbank customers to savings and loan associations, credit unions and other lending institutions (page 5), and expressed the expectation and the hope that the total activity for nonbank organizations would be small (page 6).

The Committee finally voted 10 to 5 against amending the bill, and it was reported to the Senate on September 18, 1962, (Sen. Rep. No. 2105) with only one dissent recorded (108 Cong. Rec. 21312). Senators Proxmire, Douglas, and Neuberger, and Senators Muskie and Clark filed two sets of Supplemental Views, expressing concern over the points mentioned above and over the anticompetitive problems which might arise in the operation of the service corporations.

On September 29, 1962, Senator Robertson, the Chairman of the Senate Banking and Currency Committee, discussed the bill in the Senate. He stated that three Senators were opposed to the bill and therefore it could not be brought up in the closing days of the session (108 Cong. Rec. 21311-21313, 22027-22032).[8] However on the basis of strong support from Senator Dodd of Connecticut on behalf of a group of Connecticut banks which were seeking to set up a bank service corporation, the bill was taken up on October 3, 1962, after the sponsors of the bill had reluctantly agreed to accept the Proxmire amendment which become Section 4 of the Bank Service Corporation Act:

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[8] The second session of the 87th Congress ended on October 13, 1962; Senate leaders are reluctant to bring up a controversial bill which might be the subject of extended debate during the closing days of a session, unless the bill is of the utmost importance. See Senate Report No. 2105, pages 7-8.

> *Sec. 4.* No bank service corporation may engage in any activity other than the performance of bank services for banks.[9]

This new Section 4, as revised by the Proxmire amendment, obviated the concern expressed by both the majority and the minority members of the Senate Banking and Currency Committee over the possibility of abuse of the authority of bank service corporations to perform a broad range of services in situations having no relation, incidental or otherwise, to the bank or to the banking business.

During consideration of H.R. 8874 by the House Committee a new provision, Section 5, unrelated to bank service corporations or to the purpose of that bill, was added at the request of the Federal Reserve Board and the Federal Deposit Insurance Corporation and over the objection of the Comptroller. The new section prohibited all insured banks from having service bureaus or other firms perform services for them, unless the bank regulatory agencies were permitted to regulate and examine the performance of such work. The fact that Congress added this new and unrelated provision to H.R. 8874 makes even more significant the fact that Congress could have added (but did not) a provision prohibiting banks themselves from performing data processing services for other banks and

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[9] Chairman Spence sought to obtain House approval of the Senate amendment on October 4, 1962, so that the bill could be sent to the President without a conference, but he was unable to do so because of an objection from Congressman Patman (108 Cong. Rec. 22307). On the following day, however, October 5, 1962, Congressman Patman brought the bill up himself and obtained unanimous consent for the House to concur in the Senate amendment (108 Cong. Rec. 22612), sending the bill to the President, who signed it into law on October 23, 1962 (P.L. 87-856; 76 Stat. 1132; 12 U.S.C. 1861-1865).

bank customers at the time they were adopting the Proxmire amendment to Section 4, which prohibited bank service corporations from doing so. (Of course, there is no assurance that a bill containing such a provision would have become law. What a bill does not provide may be just as important as what it does provide, in the resolution of forces leading up to the enactment of a controversial bill.)

The reluctant acceptance of the Proxmire amendment to Section 4 does not evidence any legislative purpose to protect data processing firms from competition by banks, such as would provide a basis for standing in this suit. On the contrary, the limited nature of the Congressional purpose in the acceptance of this amendment is shown by the fact that the activities of savings and loan service corporations are not restricted to the performance of services for savings and loan associations.

The original House version of H.R. 8874 authorized savings and loans, among others, to participate as members in the new bank service corporations. (See Senate Report No. 2105, page 5.) Although this authority was never deleted, it was rendered meaningless by the Proxmire amendment which prohibited bank service corporations from performing any activities except bank services for banks.

The denial to savings and loan associations of the opportunity to use the facilities of bank service corporations resulted in a provision in the Housing Act of 1964 (P.L. 88-560, Sec. 905; 12 U.S.C. 1464(c)), which permits Federal savings and loan associations to form and join savings and loan service corporations. Under Federal Home Loan Bank Board regulations,

these corporations may perform bookkeeping, accounting, statistical or other functions "primarily for savings and loan associations" (12 Code of Federal Regulations Sec. 545.9-1, as amended effective March 16, 1968). The Board also issued a statement of policy which spelled out further the activities such savings and loan corporations could perform "primarily for savings and loan associations," specifically including data processing services (12 Code of Federal Regulations, Sec. 556.3; 32 Federal Register 15747, November 16, 1967).

Assuming, then, that there can be found a Congressional purpose to protect data processing firms from some kind of competition, the protection is of extremely limited scope. It does not even apply to competition by savings and loan service corporations.

During Consideration of H.R. 8874 the House and Senate Banking and Currency Committees and the House of Representatives Were Informed That Banks Were at the Time Performing Data Processing Services for Other Banks and Business Firms and No Action To Restrict or Prohibit Such Activities Was Taken

During the course of consideration of H.R. 8874 in the House and the Senate, both the House Banking and Currency Committee and the Senate Banking and Currency Committee were informed that larger banks which could afford to acquire data processing equipment themselves were not limiting their use of this equipment to the performance of bank services for themselves, but, on the contrary, were using this equipment to provide data processing services for other banks and for business customers. Chairman Martin of the Federal Reserve Board testified at the House

hearings on H.R. 8874 to this effect (House hearings on H.R. 8874, page 34):

> Notwithstanding the high initial cost of equipment of this kind, some banks—especially the larger banks—are purchasing or leasing this equipment. Other banks are gaining access to this equipment through various contractual arrangements with data processing centers operated by private commercial concerns, and *some banks that have purchased or leased this equipment are doing data processing for other banks and business concerns.* (Emphasis supplied.)[10]

During the House debate on H.R. 8874, Congressman Roosevelt of California expressed the fear that the bill, in addition to permitting banks to collaborate together to perform data processing services, would enable them to compete with private data processing firms. (See page 31 of petitioners' brief.) Congressman Reuss, a member of the House Banking and Currency Committee, in replying to Congressman Roosevelt's inquiry, made it clear that banks were able to furnish data processing services directly, but not through subsidiary corporations.

> *Mr. Reuss.* Further on the point raised by the gentleman from California I would call his attention to the fact that a big bank which has its own data processing equipment is now able, without limitation, to go into the business of furnishing these services; so really this makes the situation referred to by the gentleman from California better rather than worse.

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[10] The same remarks were made in the statement of Mr. Frederic Solomon of the Federal Reserve Board staff presented to the Senate Banking and Currency Committee. (Senate hearings on H. R. 8874, page 64.)

Mr. Roosevelt. The gentleman from Wisconsin is telling me a bank like the Bank of America can, through a subsidiary corporation, provide these services for itself, then get into competition with other businesses?

Mr. Reuss. Not through subsidiary corporations. There is a limitation.

Mr. Roosevelt. As part of the banking service to outside people?

Mr. Reuss. That is correct. This limitation improves the situation. (108 Cong. Rec. 16501)

Petitioners argue that Congressman Reuss' statements that "this makes the situation . . . better rather than worse" and "this limitation improves the situation" make sense only if interpreted as implying that Congressman Reuss believed the bill "restricted banks as well as bank service corporations from performing data processing services." This interpretation imputes to Congressman Reuss a surprising ignorance of the text of the bill under discussion. As we have mentioned Section 4 of the bill as reported to the House, required that fifty per cent or more of the work of a bank service corporation should consist of providing bank services for banks. The language of Section 4 as reported was designed to impose this 50% limit and nothing more. Section 4 clearly imposed no restriction whatsoever on the activities of banks.

A more reasonable interpretation of Congressman Reuss' remarks is that he simply meant that a "situation" in which the new bank service corporations could only perform a maximum of 50% of their data processing work for others would be "better," in the sense of being more restrictive, than would be the existing "situation" (which the bill would not change) in which

there were no limits on the percentage of data processing services that banks were able to perform for other banks and bank customers.

II

IN LEGISLATIVE PROCEEDINGS SUBSEQUENT TO THE ENACTMENT OF THE BANK SERVICE CORPORATION ACT, CONGRESS CONTINUED TO EVIDENCE A LEGISLATIVE PURPOSE NOT TO PROTECT DATA PROCESSING FIRMS AGAINST COMPETITION BY BANKS

Bills To Restrict Bank Services

Since the enactment of the Bank Service Corporation Act several bills have been introduced in the House to prohibit banks from performing certain services, including particularly data processing services, for their depositors, borrowers or other customers. Arguments as to the authority of banks to perform these services and as to the desirability of their continuance were again and again presented to the Congress. In no case did the Congress prohibit such activities and in one case a provision which would have imposed such a prohibition was deleted. These facts—Congressional action on one bill and inaction on others—are persuasive of a continuing legislative purpose to refrain from protecting the interests of data processing firms from competition by banks—a purpose which cannot be reconciled with petitioners' claim of statutory aid to standing.

On February 25 and 26, 1964, hearings were held before the Subcommittee on Bank Supervision and Insurance of the House Banking and Currency Committee on H.R. 9548 and H.R. 9822, 88th Congress. H.R. 9548 would have prohibited any insured banks from performing bookkeeping, statistical, accounting or similar services, except incidental to the bank's function as a depository, lender, trustee or agent. At this

hearing the president of ADAPSO testified in support of H.R. 9548 and recommended that its scope be broadened to prohibit banks expressly from engaging in the general data processing and computer business except for their own internal operations. ADAPSO's statement concluded with the admission that the Bank Service Corporation Act only limited bank subsidiaries to the performance of computer services for banks, and that "[a]dditional legislation restricting the banks themselves from engaging directly in the commercial data processing business is now urgently needed." (Hearings in H.R. 9548 and H.R. 9822, 88th Congress, page 72.)

The American Bankers Association testified in opposition to H.R. 9548 and in support of the continued performance of automated customer services by banks. (Hearings on H.R. 9548 and H.R. 9822, 88th Congress, pages 120 to 138.)

Despite petitioners' plea for statutory protection against bank competition, H.R. 9548 was not reported from the House Banking and Currency Committee and did not become law.

In April and June, 1965, hearings were held on H.R. 107 and H.R. 6885, 89th Congress, on the subject of Consolidation of Bank Examining and Supervising Functions. During the testimony of the Comptroller of the Currency, James J. Saxon, the question of the authority of national banks to perform data processing services for other banks and bank customers was discussed, and the legal basis for the Comptroller's ruling on this point was attacked and defended.[11] No legisla-

[11] In footnote 22 on page 34 of their brief, petitioners quote the arguments made by the House Committee Staff against the Comptroller's position that national banks had authority to perform data processing services for other banks and bank customers. It seems

tion restricting the performance by banks of data processing services for other banks or bank customers resulted from these hearings.

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appropriate to call to the Court's attention that equal prominence was given in the record to the following arguments by the Comptroller in support of his position (Hearings on H.R. 107 and H.R. 6885, 89th Congress, page 394; Hearings on H.R. 112, H.R. 117 and H.R. 10529, 89th Congress, pages 27-28):

17. Use of data-processing equipment

It is stated in paragraph 3500 of the "Comptroller's Manual" that a national bank may make available, for the use of others, data-processing equipment acquired for the primary purpose of performing service incidental to banking. This ruling is challenged on the grounds that it is not provided for by law, and that it is contrary to the intent of Congress expressed in the Bank Service Corporation Act (12 U.S.C. 1861-1865) prohibiting any data-processing activity other than the performance of bank services for banks.

The objections are groundless in light of the provisions contained in 12 U.S.C. 24 and 12 U.S.C. 1861-1865. A national bank may clearly own and operate data-processing equipment under 12 U.S.C. 24 which authorizes it to exercise all such incidental powers as shall be necessary to carry on the business of banking. It is fundamental that if a bank is to achieve the full utilization of its investment in such equipment, it must make it available for the use of others even though it is acquired for the primary purpose of performing services incidental to banking. This conclusion is entirely consistent with and supported by the judicially recognized right of a national bank, to lease or construct a building for banking purposes even though, in order to achieve a maximum return on its investment, it intends to occupy only a part thereof and to rent out a large part of the building to others. The Bank Service Corporation Act (12 U.S.C. 1861-1865) recognizes the right of small- and medium-sized banks to organize and invest in bank service corporations to provide service comparable to that offered by the largest banks. However, nothing contained in either the act or its legislative history precludes a bank from owning its own data-processing equipment or from sharing in the ownership of such equipment through a corporation owned by it with individuals or with corporations other than banks.

In March of 1966, hearings were held by the Subcommittee on Bank Supervision and Insurance of the House Banking and Currency Committee on H.R. 112, H.R. 117 and H.R. 10529, 89th Congress. H.R. 112 and H.R. 10529 would have prohibited banks from performing bank services for other banks and bank customers. Representatives of ADAPSO testified in support of these bills, and in opposition to the continuance by banks of this practice. The American Bankers Association testified in opposition to these bills, taking the position that the performance of these services was lawful and desirable. H.R. 112 and H.R. 10529 were not reported from the House Banking and Currency Committee and were not enacted into law.

The Antilottery Law—P.L. 90-203

Further Congressional recognition of the fact that data processing is a common bank service performed for customers and a specific Congressional rejection of an opportunity to enact legislation to protect petitioners' competitive interests occurred during the development of H.R. 10595 in the 90th Congress. This House bill, designed "to prohibit certain banks and savings and loan associations from fostering or participating in gambling activities," initially contained a provision to prohibit banks from performing data processing services for lotteries. The bill would have made it illegal for insured banks and savings and loan associations to "deal in" lottery tickets or to publicize or "keep any record of the existence or identity of any participant or winner, as such, in a lottery." "Deal in" was defined as "making, taking, buying, selling, redeeming, collecting, keeping any books or records with respect to, or otherwise handling in any way."

During hearings before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, Senator McIntyre of New Hampshire voiced his concern that H.R. 10595 as drafted by the House would prevent banks from performing for the New Hampshire Sweepstakes Commission certain bank services, including data processing, which they normally perform for other businesses and individuals. His letter to the committee states:

> In obedience to its responsibilities under state law, the Commission has entered into a number of relationships with financial institutions which do not at all differ from the relationships which those institutions have with many respectable, law-abiding businesses and individuals.
>
> For example, the Sweepstakes Commission maintains a checking account in a commercial bank. It leases safe deposit facilities. It has contracted for time on automatic data processing equipment.
>
> These relationships with financial institutions are clearly within the right of an agency of a State of the United States. Nevertheless, it is my belief that each of them would be prohibited by the enactment of H.R. 10595. I would hope that the Subcommittee on Financial Institutions would find it possible to amend H.R. 10595 so that State agencies would be permitted to continue making normal use of financial institutions, regardless of the particular responsibilities of those agencies. (Senate hearings on H.R. 10595, page 21.)

In response to Senator McIntyre's request the Senate Committee on Banking and Currency amended the House bill by deleting the prohibitions on record keeping, bookkeeping and "otherwise handling" lottery tickets. ~~(Senate hearings on H.R. 10595, page 21.)~~ At page 5 of the committee report filed for Senator

Proxmire by Senator Byrd of West Virginia (Senate Report No. 727, 90th Congress, November 6, 1967), Senator Proxmire made the following statement for the committee as to the purpose and effect of these amendments:

> In recommending this legislation, the committee approved amendments which permit federally insured banks and savings and loan associations to engage in record keeping activities and to perform other custodial functions on behalf of the State lottery. Such institutions would be forbidden to sell lottery tickets directly to the public or to advertise or promote the lottery, but they could perform other services such as record keeping, data processing, as well as the acceptance of the proceeds of the lottery ticket sales for delivery, payment, or transfer to the State. Banks would also be permitted to distribute lottery tickets to duly authorized sales agents of the State and could make payment to the winners in such lotteries. Since these are common bank services which are already performed for other bank customers, the committee does not believe it feasible or practical to prohibit banks from performing these same services on behalf of a State lottery. However, the direct sale of lottery tickets to the general public is not incident to the business of banking and would be prohibited by the bill.

Senator McIntyre in his Individual Views (printed in the Senate Report at page 21) also made the following comments with respect to the amendments:

> I do feel that the bill reported out by the committee is a clear improvement over the bill as it was received from the House. The committee amendments, adopted with no opposition, make it clear that the committee does not intend to interfere with such functions of financial institutions—

safe-keeping and distribution, data processing, maintaining demand deposits, etc., which they may wish to perform for State-operated lotteries on the same basis as may be done for other customers.

The Committee amendments, although agreed to by the Senate, were not accepted by the House and a Conference Committee was appointed. The Committee rewrote the text of the bill, retaining the substance of the Senate amendments. The House provisions which would have prohibited data processing were not included in the conference bill, and instead the report included a statement of intention not to prohibit lawful banking services.[12]

On December 12, 1967, the House considered an approved the conference report. Congressman Patman, Chairman of the House Banking and Currency Committee, pointed out that "[t]he prohibition dealing with redeeming, collecting, bookkeeping, and record activities was deleted from the House bill by the Senate" and he stated that this deletion was accepted by the conferees so that "insured financial institutions, where authorized by law, may perform bookkeeping and record service for authorized State lotteries." (113 Cong. Rec. 35954).

Congressman Ashley, a member of the House Banking and Currency Committee and one of the House conferees on H.R. 10595, discussed the Senate amendments and their significance in some detail. (113 Cong. Rec. 35955-6). He quoted from Senator McIntyre's

[12] The House Conferees in their statement to the House on the effect of the amendments to the House bill stated that the bill was not intended to give any new authority to banks to perform data processing services or to take away any existing authority. House Report No. 1018, 90th Congress.

letter to the Senate Banking and Currency Committee (see page 25 above) and from that Committee's report (see page 26 above) in order to make it clear that the Senate Committee and the Senate were fully aware that the Senate Committee amendments, adopted at Senator McIntyre's request—which were incorporated in substance in the conference bill Congressman Ashley was urging the House to adopt—were intended to permit banks to continue to provide to lotteries "common bank services which are already performed for other bank customers," including specifically data processing. (113 Cong. Rec. 35955-6).

Congressman Ashley continued with the following remarks on the legislative history of H.R. 10595 and its significance, after which the House approved the bill and sent it to the President for his signature:

> The House bill would clearly have prohibited insured banks and savings and loan associations from performing bookkeeping, data processing, and similar services for lotteries. The Senate amendments deleted these prohibitions, and the conference bill now before the House contains nothing whatever which authorizes or permits banks or savings and loan associations to perform data processing services for State lotteries, and nothing whatever which prohibits banks or savings and loan associations from performing data processing services for State lotteries, or for anyone else.
>
> In other words, the conference version of the bill is completely silent and neutral with respect to data processing and the existing law on the subject would not be affected in any respect by the Senate version of the bill.
>
> The deletion by the Senate of the prohibition in the House bill against the performance by banks

of data processing services in connection with lotteries is not, of course, in itself a grant of authority to perform such services. Such authority must be found elsewhere in the statute, primarily in the National Bank Act in the case of national banks and in the State banking codes in the case of State banks. It is appropriate, however, to point out that the prohibition would have been unnecessary and meaningless unless there was authority elsewhere, and the deletion of the prohibition would likewise have been ineffective and meaningless unless there was authority elsewhere. (113 Cong. Rec. 35955-6).

CONCLUSIONS

1. The purpose of the Bank Service Corporation Act was to authorize banks to own stock in subsidiary corporations.

2. The purpose of Section 4 of the Bank Service Corporation Act was to restrict the activities of bank service corporations; Section 4 does not apply to the activities of banks and it was not intended to protect anyone from the activities of banks.

3. The performance of data processing by banks was repeatedly brought to the attention of Congress and Congress repeatedly refused to approve proposals prohibiting such banks from performing data processing activities for other banks and bank customers.

4. Neither Section 4 of the Bank Service Corporation Act nor the entire Act evidences a Congressional concern to protect data processors from competition by national banks sufficient to support petitioners' claim of standing to attack the validity of an order of the Comptroller of the Currency authorizing national banks to perform data processing services for other

banks or bank customers; on the contrary, the legislative history of the Bank Service Corporation Act and subsequent legislative proposals clearly evidence a Congressional purpose not to provide such protection.

Respectfully submitted,

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October 31, 1969

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ELSIE F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 85

ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC., et al.,
Petitioners,

vs.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, et al.,
Respondents.

Motion of Sierra Club for leave to file brief as amicus curiae and Brief of the Sierra Club Amicus Curiae

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Respondents.

Motion of Sierra Club for leave to file brief as amicus curiae

The Sierra Club, a California non-profit corporation, respectfully moves this Court for leave to file a brief in this case as *amicus curiae*. The consent of the attorneys for the petitioners herein has been obtained, and the Solicitor General of the United States has consented, but the attorney for respondent American National Bank and Trust Company has refused to consent to the filing of a brief by Sierra Club as *amicus curiae*.

The applicant, the Sierra Club, has an interest in this case in that it is a party to cases pending in several courts in the United States in which the question of "standing" is involved. The issue of "standing" is involved in this case,

in that the decision of the Court of Appeals for the Eighth Circuit was grounded basically upon the proposition that petitioners herein lacked "standing". *Association of Data Processing Service Organizations, Inc. v. Camp,* 406 F2d 837 (8th Cir. 1969).

The case at bar is a "competition" case (a subclass of "standing" cases in which the plaintiff is objecting to governmental action which creates the possibility of enhanced competition). Applicant believes that the case will be briefed and argued substantially in terms of the body of law dealing with "competition" cases on "standing", and that the much broader implications of the "standing" doctrine in other cases, such as in those in which the Sierra Club is a party, will be not adequately briefed or argued.

If the principal argument intended to be advanced by the Sierra Club is approved by this Court, then the decision of the lower court in this case must be reversed. If other points to be urged by the Sierra Club are approved by this Court, then its decision in this case will be carefully limited to the factual situation presented, even if the judgment is affirmed.

DATED: August 22, 1969

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In the Supreme Court of the United States

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Respondents.

Brief of the Sierra Club Amicus Curiae

I

INTEREST OF THE SIERRA CLUB

The Sierra Club is interested in the "standing" issue in this case. It urges reversal of the Court of Appeals' decision that the Association of Data Processing Service Organizations (hereinafter "ADAPSO") lacked standing to challenge the rulings of the Comptroller of the Currency here in issue.

The Sierra Club is presently engaged in litigation against governmental officials in which its "standing" has been challenged.[1]

Although the lower courts have recently decided in favor of the Sierra Club's standing in the cases which it is litigating, the decision of the Eighth Circuit in this case has been cited for the proposition that the Sierra Club lacks such standing. The Eighth Circuit's very narrow construction, in the case at bar, of § 10 of the Administrative Procedure Act (5 USC § 702) would greatly restrict the "standing" of potential plaintiffs seeking to challenge administrative action. Accordingly, the Sierra Club urges that the Eighth Circuit's decision in this case is either:

(1) Erroneous, or

(2) Should be strictly limited to the facts of the case.

The Sierra Club is a non-profit California corporation headquartered in San Francisco with a national membership of about 78,000. For many years the Sierra Club, by its activities and conduct, has exhibited a special interest in conservation, regularly serving as a responsible representative of its members and other persons similarly interested. One of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada mountains and other similar areas of natural beauty throughout America which are threatened by damage or destruction by the growth of population and the expansion of commercial and industrial enterprise into ever more remote geographical locations.

The societal values which the Sierra Club has championed have, to a significant degree, been recognized by

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1. *Sierra Club v. Hickel*, U.S.D.C. N.D. Calif. No. 51464, ("Mineral King" case); *Citizens Committee v. Volpe*, U.S.D.C. S.D. N.Y. Nos. 69 Civ. 295 and 69 Civ. 305 ("Hudson River Expressway" case).

Congress and embodied in statutes creating National Parks, National Seashores, governing the use of National Forests, National Game Refuges, and navigable waters of the United States, and controlling the construction of projects such as roads, pipelines, power lines, dikes, causeways and dams.

Since the parties to the case at bar are interested in the ramifications of a purely commercial competitive situation, the Sierra Club feared that the elements of the complicated question of "standing" would not be fully briefed or argued by the parties. To provide a broader perspective on the "standing" question, particularly as it relates to the type of litigation in which the Sierra Club is engaged, the Sierra Club appears herein as *amicus curiae.*

II

ARGUMENT

A. Introduction.

The concept of "standing" to seek judicial review of administrative action is both large and complex, as befits a doctrine which must deal with the enormous range and scope of governmental action in a complicated society. Congress has necessarily entrusted the execution of its mandates to the enormous and far-flung bureaucracy of the executive branch of government, and to agencies not subject to direct control by the executive. The activities of federal officers affect many aspects of the lives of all Americans. Unless carefully examined in advance, a broadly stated rule of "standing" applicable to judicial review of all types of administrative actions could have serious untoward and unsuspected consequences.

Moreover, the question of "standing" necessarily involves the court in at least a minimal examination of the merits of the case. It must, as a minimum, know who the plaintiff

is, who the defendant is, and the general nature of the defendant's activity of which the plaintiff complains. Having seen that much, the court may be subtly influenced in its decision on "standing" by its estimate of the probable likelihood of the plaintiff's success. In terms of judicial economy, it is certainly easier to throw the plaintiff out of court for lack of standing than to try the case and throw him out on the merits.

But that solution assumes that the challenged action was in fact proper. What of the case in which it was not?

Where a federal official has in fact acted in excess of his statutory authority, or contrary to it, there is only one effective remedy: A lawsuit. Since Congress has already expressed its will in the statute, and the officer has equally expressed his intention to disregard the will of Congress, the remedy (if there is to be one) must be in the courts.

Of course, the position of the judiciary is a delicate one. The Constitution does not contemplate the federal judiciary as the ultimate ruling body of the nation. Nevertheless, denial of "standing" in a plaintiff is only one (and probably the least satisfactory) method of preserving the appropriate balance between the three branches of government.

Indeed, in almost any controversy involving a suit against a federal official, there are a number of grounds for denying the plaintiff relief:

1. The plaintiff has no standing;
2. There is no "case or controversy";
3. The defendant has immunity;
4. The federal officer has acted properly, or at least not demonstrably improperly.

From the plaintiff's point of view, his challenge to unlawful action by a federal officer can founder on any of those shoals, and the result to him is the same—he loses.

However, it is substantially less satisfying to the plaintiff complaining of unlawful administrative action to be told that he may not sue for a procedural reason, than to be told that while he may sue, he may not have relief because the challenged activities of the federal officer were in fact proper (or at least within the scope of his discretion). Although, in the latter case, the plaintiff may not like the substantive law's result, he at least knows that the law has been obeyed.

The purpose of the law in a democracy, after all, is to satisfy the people of the nation that it is possible to get justice within the framework of an ordered liberty.

To deny relief to a plaintiff attempting to challenge administrative action on the grounds that he lacks "standing" may leave him to watch in helpless rage while the errant federal official blithely sets at naught the will of the people as expressed through Congress.

In short, the price that must be paid for a narrow interpretation of "standing" is the frank acknowledgement that many types of lawless administrative action nonetheless remain beyond the reach of justice.

Thus, the first and probably most important question in any "standing" case is whether a denial of standing will have the effect of making an administrator's action unreviewable even though Congress has never expressly called for such a result, but has, to the contrary, expressed the general rule in favor of judicial review through the Administrative Procedure Act. We believe that, absent clear evidence of intent to make administrative action unreviewable, the Administrative Procedure Act should be construed to confer "standing" upon persons "adversely affected" or "aggrieved" by particular administrative action in the broadest sense of those terms. The principle

evidenced by *Flast v. Cohen,* 392 U.S. 83 (1968), *Hardin v. Kentucky Utilities Co.,* 390 U.S. 1 (1968) and *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967) is clearly correct and should be continued.

B. There is a strong policy of the law favoring judicial review.

In *Flast v. Cohen,* 392 U.S. 83 (1968) this Court broke through the "impenetrable barrier" of *Frothingham v. Mellon,* 262 U.S. 447 (1923) which for forty-five years had precluded suits by plaintiffs whose "case or controversy" was an abiding conviction of the unlawfulness of official action in spending money and whose sole interest in the outcome was some infinitesimal, unmeasurable interest as a taxpayer.

Mr. Justice Douglas, in his concurring opinion, noted that the restraint upon standing imposed by *Frothingham* has been supplanted in recent years by a different type of restraint—a refusal to pass upon the wisdom or reasonableness of legislation under the rubric of "substantive due process".

The same rationale applies here. It may be that the plaintiff should not prevail. The reviewing court may express its restraint in the scope of its review of the merits of the case. But the plaintiff should not be turned away if he has any interest adversely affected by the challenged administrative action.

The Administrative Procedure Act allows review to one "adversely affected or aggrieved . . . within the meaning of a relevant statute." (5 U.S.C. § 702.) That provision, in effect, puts the "adversely affected or aggrieved" concept, which appears directly in many statutes, into all statutes governing administrative action. The question is, what is meant by "adversely affected or aggrieved"?

In the cases involving statutes with self-contained review provisions for persons adversely affected or aggrieved, the

classes of plaintiffs with "standing" have (properly) been drawn liberally. See *Joseph v. FCC,* 404 F2d 207 (D.C. Cir. 1968); *United Church of Christ v. FCC,* 359 F2d 994 (D.C. Cir. 1966); *Scenic Hudson Preservation Conference v. FPC,* 354 F2d 608 (2d Cir. 1965); *State of Washington Dept. of Game v. FPC,* 207 F2d 391, 395 f.n. 11 (9th Cir. 1953); *Associated Industries v. Ickes,* 134 F2d 694, 705-707 (2d Cir. 1943), vacated as moot 320 U.S. 707 (1943).

The Administrative Procedure Act should be construed as liberally as the similar language in the statutes with self-contained administrative review provisions. A number of courts have reached this result. See e.g. *Norwalk CORE v. Norwalk Redevelopment Agency,* 395 F2d 920, 933 f.n. 26 (2d Cir. 1968); *Citizens Committee for the Hudson Valley v. Volpe,* ..... F.Supp. ..... (S.D. N.Y. 1969); *Powelton Civic Home Owners Assn. v. Dept. of HUD,* 284 F.Supp. 809, 827-828 (E.D. Pa. 1968); *Road Review League v. Boyd,* 270 F.Supp. 650, 659-661 (S.D. N.Y. 1967).

Indeed if the rule of standing is, as *Flast v. Cohen* suggests, a judicially-created rule of self-restraint, then there would appear to be no reason in proper cases why the mere willingness to undertake the expense and trouble of bringing the lawsuit should not evidence a sufficient level of "aggrievement" to support the plaintiff's standing. Cf. *United Church of Christ v. FCC,* 359 F2d 994, 1005 (D.C. Cir. 1966).

C. "Competitor" cases are special cases.

The particular danger inherent in this case—to the Sierra Club and many other potential plaintiffs—is that it is a "competitor" case. Competition is the life of trade, and, generally speaking, the law of the land. America's strong policy against restraints of trade makes cases such as the case at bar unattractive on the merits; ADAPSO is com-

plaining that its members will be faced with additional competition from national banks.

Since there are general policies of the law favoring both competition on the one hand and judicial review of administrative action on the other, a complicated metaphysics of "standing" has grown up in the "competitor" cases, revolving around concepts such as "lawful competition" and inquiries into the purpose of the legislation which commingle the standing issue with the merits of the case to be decided. (See e.g. *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968). (Cf. *Flast v. Cohen*, 392 U.S. 83, 100, f.n. 21 (1968).)

The problem arises in attempting to look beyond the *plaintiff* to the merits of the controversy. As *Flast v. Cohen* points out, "[t]he fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." (392 U.S. at 99.)

It may be that, on the merits, most competitors complaining of new competition created or permitted by government action have no case. If so, the deficiencies of their cases on the merits should not be confused with lack of "standing". The procedures for disposing of legally insufficient complaints *on the merits* through motion for summary judgment under Rule 56, Fed. R. Civ. P., or even for judgment on the pleadings under Rule 12(c), Fed. R. Civ. P. are readily available, and summary in nature. In short, no good reason appears why cases of this sort cannot be decided equally easily on the merits.

Where, as here, the plaintiff has an interest in the administrative action because of its obvious impact on his competitive position, that should end the inquiry, as far as "standing" is concerned.

D. Some administrative action is "Reversible", some "Irreversible"

If all opponents of an unlawful administrative action are denied "standing" in the courts, their only remedy is to try to change administrations through the ballot box. At best, this is a crude remedy.* At worst, it is no remedy at all, because some kinds of administrative action are like the proverbial scrambled egg—there is no way to unscramble them.

The case at bar presumably does not involve "irreversible" administrative action. Although the competition of national banks may hamper the growth of independent data processing service organizations it will not necessarily destroy them. There appears to be no good reason why, if national banks were ultimately required to withdraw from outside data processing activities, the service organizations would not immediately leap in and fill the gap.

By comparison, the kinds of administrative action which the Sierra Club has attacked in court typically involve projects of that sort which, once completed, have irreversibly altered the landscape in such a way that it cannot be restored for a very long time, if ever.

Where the unlawful administrative action will be irreversible, the ballot box is likely to offer no remedy at all, for by the time the administration changes, the damage is likely to be done.

The distinction between cases of "reversible" administrative action and action which is final, and for practical purposes irreversible, is an important distinction which should be borne in mind in any overall analysis of the law of "standing". If, by the nature of the problem, it is not

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*As Professor Jaffe observes, "Formal majorities register judgments occasionally, and then as a rule not on specific issues but on total performance." (Standing to Secure Judicial Review: Public Actions 74 Harv. L. Rev. at 1286-1287)

susceptible of solution by the political process, the courts should not shrink from their responsibilities. Cf. *Baker v. Carr,* 369 U.S. 186 (1962).

E. The "Intended Beneficiary" approach to standing is defective.

The lower court decisions involving the Comptroller's power to put national banks into other businesses have given rise to conflicting decisions on standing. In *Saxon v. Georgia Ass'n of Independent Ins. Agents, Inc.* 399 F2d 1010 (5th Cir. 1968) the Fifth Circuit upheld standing of the insurance agents. In *Arnold Tours, Inc. v. Camp,* 408 F2d 1147 (1st Cir. 1969) the First Circuit ruled against the travel service on standing, but in the same opinion (dealing with the consolidated case of *Wingate Corp. v. Industrial National Bank)* the First Circuit refused to deny standing to a data processor, in direct conflict with the case at bar. (*Ibid,* at 1153) In *Camp v. Investment Company Institute,* ..... F2d ..... (D.C. Cir. 1969), a majority of the District of Columbia Circuit had "reservations about standing" but resolved them in favor of the Investment Company Institute (and then ruled against it on the merits).

Superficially, it might seem appropriate to distinguish the "competitor" cases between those in which the statute in question was intended to shelter the plaintiff from competition and those in which the incidental and perhaps unintended effect was to shelter the plaintiff from competition. But why should that be so? Is it because the incidental beneficiary of the statute has no legal "right" or is it because the "direct" beneficiary is thought to be a more appropriate plaintiff? What if the "direct" beneficiary doesn't want to bring suit? (Cf. *Associated Industries v. Ickes,* 134 F2d 694, (2d Cir. 1943). What if there is no "direct" beneficiary except the public at large?

Suppose, for example, that the purpose of all of the limitations upon the businesses in which national banks may engage is to prevent bank failures. The narrower purpose of preventing bank failures would be to protect national bank depositors (a very large class). The overall purpose would be to protect the general public (an even larger class) from the adverse consequences to the entire economy which might be expected to follow any large-scale loss of confidence in the stability of national banks.

So, who should the plaintiff be if the Comptroller of the Currency unlawfully permits national banks to sell insurance, run travel agencies, operate mutual funds, and offer data processing services? It is hard to visualize any person or group willing or able to test the Comptroller's action except someone already in those businesses who fears the added competition.

Petitioners serve the function of "private attorneys general" in testing the Comptroller's actions here, even though their *motive* may be the commercial objective of eliminating unwanted competition. Although a commercial motive may not give petitioners *greater* standing than those with private, or personal, or in any event non-commercial motives, it is hard to see why petitioners' commercial motivation should give them *less* claim to standing. Cf. *Flast v. Cohen,* 392 U.S. 83 (1968); *Baker v. Carr,* 369 U.S. 186 (1962); *United Church of Christ v. FCC,* 359 F2d 994 (D.C. Cir. 1966); *Scenic Hudson Preservation Conference v. FPC,* 354 F2d 608 (2d Cir. 1965); *Powelton Civic Home Assn. v. HUD,* 284 F.Supp. 809 (E.D. Pa. 1968); *Road Review League v. Boyd,* 270 F.Supp. 650 (S.D.N.Y. 1967).

F. A broad rule of "Standing" will not flood the courts.

A broad conception of "standing" for responsible groups representing important social interests will not create

massive litigation. There is no money in it. Only groups of citizens deeply concerned about the legality of particular administrative action will tax themselves to finance the expensive quest for judicial relief.

Even the complete elimination of a "standing" barrier would not swamp the courts with litigation if the experience with taxpayers' suits is any guide. Professor Davis documents the point ("opening the judicial doors to taxpayers' suits does not cause floods; it hardly causes trickles") in his provocative article "Standing: Taxpayers and Others", 35 U. Chi. L. Rev. 601, 634 (1968).

Since the challenge made to an unlawful administrative act is by its nature "a matter of principle", a determination that a government official is acting in excess of statutory authority will ordinarily result in relief for all persons adversely affected (whether or not they are formal parties to the suit). In many, if not most, instances, the class of persons adversely affected can be expected to join together in a single suit or simply to ride the legal coattails of any responsible champion of their interests.

Moreover, the problems of floods of litigation have been greatly ameliorated in recent years by the procedural devices which permit the use of class suits, consolidation of cases and multi-district transfers to keep even the most massive litigation under tight judicial control. (Fed. R. Civ. P. Rules 23, 42; 28 U.S.C. § 1407.)

III

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be reversed and the case remanded for decision on the merits. Alternatively, the Court's holding should be so limited as not to suggest an inappropriately

narrow rule of "standing" in those cases in which the public interest rather than a purely commercial private interest is the motivating factor for the litigation.

DATED: August 22, 1969

Respectfully submitted,

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 85.—October Term, 1969

Association of Data Processing Service Organizations, Inc., et al., Petitioners, *v.* William B. Camp, Comptroller of the Currency of the United States, et al.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[March 3, 1970]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioners sell data processing services to businesses generally. In this suit they seek to challenge a ruling by respondent, Comptroller of the Currency, that, as an incident to their banking services, national banks, including respondent American National Bank & Trust Company, may make data processing services available to other banks and to bank customers. The District Court dismissed the complaint for lack of standing of petitioners to bring the suit. 279 F. Supp. 675. The Court of Appeals affirmed. 406 F. 2d 837. The case is here on a petition for writ of certiorari which we granted. 395 U. S. 976.

Generalizations about standing to sue are largely worthless as such. One generalization is, however, necessary and that is that the question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to "cases" and "controversies." As we recently stated in *Flast* v. *Cohen*, 392 U. S. 83, 101, ". . . [I]n terms of Article III limita-

tions on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast* was a *taxpayer's* suit. The present is a *competitor's* suit. And while the two have the same Article III starting point, they do not necessarily track one another.

The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise. There can be no doubt but that petitioners have satisfied this test. The petitioners not only allege that competition by national banks in the business of providing data processing services might entail some future loss of profits for the petitioners, they also allege that respondent American National Bank & Trust Company was performing or preparing to perform such services for two customers for whom petitioner Data Systems, Inc., had previously agreed or negotiated to perform such services. The petitioners' suit was brought not only against the American National Bank & Trust Company, but also against the Comptroller of the Currency. The Comptroller was alleged to have caused petitioners injury in fact by his 1966 ruling which stated:

> "Incidental to its banking services, a national bank may make available its data processing equipment or perform data processing services on such equipment for other banks and bank customers." Comptroller's Manual for National Banks ¶ 3500 (October 15, 1966 ed.).

The Court of Appeals viewed the matter differently, stating:

> "[A] plaintiff may challenge alleged illegal competition when as complainant it pursues (1) a legal interest by reason of public charter or contract, . . .

> (2) a legal interest by reason of statutory protection, . . . or (3) a 'public interest' in which Congress has recognized the need for review of administrative action and plaintiff is significantly involved to have standing to represent the public . . . ." 406 F. 2d, at 842–843.[1]

Those tests were based on prior decisions of this Court, such as *Tennessee Power Co.* v. *TVA*, 306 U. S. 118, where private power companies sought to enjoin TVA from operating, claiming that the statutory plan under which it was created was unconstitutional. The Court denied the competitors' standing, holding that they did not have that status "unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Id.*, at 137–138.

The "legal interest" test goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Thus the Administrative Procedure Act grants standing to a person "aggrieved by agency action within the meaning of a relevant statute." 80 Stat. 392, 5 U. S. C. § 702. That interest, at times, may reflect "aesthetic conservational, and recreational" as well as

[1] The first two tests applied by the Court of Appeals required a showing of a "legal interest." But the existence or non-existence of a "legal interest" is a matter quite distinct from the problem of standing. *Barlow* v. *Collins*, *ante*, at p. —. The third test mentioned by the Court of Appeals, which rests on an explicit provision in a regulatory statute conferring standing and is commonly referred to in terms of allowing suits by "private attorneys general," is inapplicable to the present case. See *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470; *Associated Industries* v. *Ickes*, 134 F. 2d 694, vacated on suggestion of mootness, 320 U. S. 707.

economic values. *Scenic Hudson Preservation Conf.* v. *Federal Power Commission*, 354 F. 2d 608, 616; *United Church of Christ* v. *FCC*, 359 F. 2d 994, 1000–1006. A person or a family may have a spiritual stake in First Amendment values sufficient to give him standing to raise issues concerning the Establishment Clause and the Free Exercise Clause. *Abington School District* v. *Schempp*, 374 U. S. 203. We mention these non-economic values to emphasize that standing may stem from them as well as from the economic injury on which petitioner relies here. Certainly he who is "likely to be financially" injured, *Commission* v. *Sanders Radio Station*, 309 U. S., at 477, may be a reliable private attorney general to litigate the issues of the public interest in the present case.

Apart from Article III jurisdictional questions, problems of standing, as resolved by this Court, have involved a "rule of self-restraint for its own governance." *Barrows* v. *Jackson*, 346 U. S. 249, 255. Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise. *Muskrat* v. *United States*, 219 U. S. 346.

Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved "persons" is symptomatic of that trend. In a closely analogous case we held that an existing entrepreneur had standing to challenge the legality of the entrance of a newcomer into the business, because the established business was allegedly protected by a valid city ordinance which protected it from unlawful competition. *Chicago* v. *Atchison, T. & S. F. R.* 357 U. S. 77, 83–84. In that tradition was *Hardin* v. *Kentucky Utilities Co.*, 390 U. S. 1, which involved a section of the TVA Act designed primarily to protect, through area limitations, private utilities against TVA

competition. We held that no explicit statutory provision was necessary to confer standing, since the private utility bringing suit was within the class of persons which the statutory provision was designed to protect.

It is argued that the *Chicago* case and the *Hardin* case are relevant here because of § 4 of the Bank Service Corporation Act of 1962, 76 Stat. 1132, 12 U. S. C. § 1864, which provides:

> "No bank service corporation may engage in any activity other than the performance of bank services for banks."

The Court of Appeals for the First Circuit held in *Arnold Tours Inc.* v. *Camp*, 408 F. 2d 1147, 1152–1153, that by reason of § 4 a data processing company has standing to contest the legality of a national bank performing data processing services for other banks and bank customers:

> "Section 4 had a broader purpose than regulating only the service corporations. It was also a response to the fears expressed by a few senators, that without such a prohibition, the bill would have enabled 'banks to engage in a nonbanking activity,' S. Rep. No. 2105, [87th Cong., 2d Sess., pp. 7–12] (Supplemental views of Senators Proxmire, Douglas, and Neuberger), and thus constitute 'a serious exception to the accepted public policy which strictly limits banks to banking.' (Supplemental views of Senators Muskie and Clark.) We think Congress has provided the sufficient statutory aid to standing even though the competition may not be the precise kind Congress legislated against."

We do not put the issue in those words, for they implicate the merits. We do think, however, that § 4 arguably brings a competitor within the zone of interests protected by it.

That leaves the remaining question, whether judicial review of the Comptroller's action has been precluded. We do not think it has been. There is great contrariety among administrative agencies created by Congress as respects "the extent to which, and the procedures by which, different measures of control afford judicial review of administrative action." *Stark* v. *Wickard*, 321 U. S. 288, 312 (Justice Frankfurter dissenting). The answer, of course, depends on the particular enactment under which review is sought. It turns on "the existence of courts and the intent of Congress as deduced from the statutes and precedents." *Id.*, at 308.

The Administrative Procedure Act provides that the provisions of the Act authorizing judicial review apply "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 80 Stat. 392, 5 U. S. C. § 701 (a).

In *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 51, we referred to "the generous review provisions" of that Act; and in that case as well as in others (see *Rusk* v. *Cort*, 369 U. S. 367, 379–380) we have construed that Act not grudgingly but as serving a broadly remedial purpose.

We read § 701 (a) as sympathetic to the issue presented in this case. As stated in the House Report:

> "The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 41.

There is no presumption against judicial review and in favor of administrative absolutism (see *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140), unless that purpose is fairly discernible in the statutory scheme. Cf. *Switchmen's Union* v. *Mediation Board*, 320 U. S. 297.

We find no evidence that Congress in either the Bank Service Corporation Act or the National Bank Act [2] sought to preclude judicial review of administrative rulings by the Comptroller as to the legitimate scope of activities available to national banks under those statutes. Both Acts are clearly "relevant" statutes within the meaning of § 702. The Acts do not in terms protect a specified group. But their general policy is apparent; and those whose interests are directly affected by a broad or narrow interpretation of the Act are easily identifiable. It is clear that petitioners, as competitors of national banks which are engaging in data processing services, are within that class of "aggrieved" persons who, under § 702, are entitled to judicial review of "agency action."

Whether anything in the Bank Service Corporation Act or the National Bank Act gives petitioners a "legal interest" which protects them against violations of those Acts, and whether the actions of respondents did in fact violate either of those Acts, are questions which go to the merits and remain to be decided below.

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[2] Petitioners allege that the Comptroller's ruling violates the National Bank Act, Rev. Stat. § 5136, 12 U. S. C. § 24 Seventh, which provides that national banks have power to exercise "all such incidental powers as shall be necessary to carry on the business of banking."

We intimate no view under the decisions rendered today on the issue of standing involved in No. 835, *National Association* v. *Securities & Exchange Commission*, and No. 843, *Investment Company Institute* v. *Camp*, now pending on petitions for writs of certiorari.

We hold that petitioners have standing to sue and that the case should be remanded for a hearing on the merits.

Reversed.